TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 423

BRADFORD ELECTRIC LIGHT COMPANY, INC.,
PETITIONER,

vs.

JENNIE M. CLAPPER, ADMINISTRATRIX

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 29, 1931

CERTIORARI GRANTED DECEMBER 7, 1931

(36,237)

(36,237)

SUPREME COURT OF THE UNITED STATES

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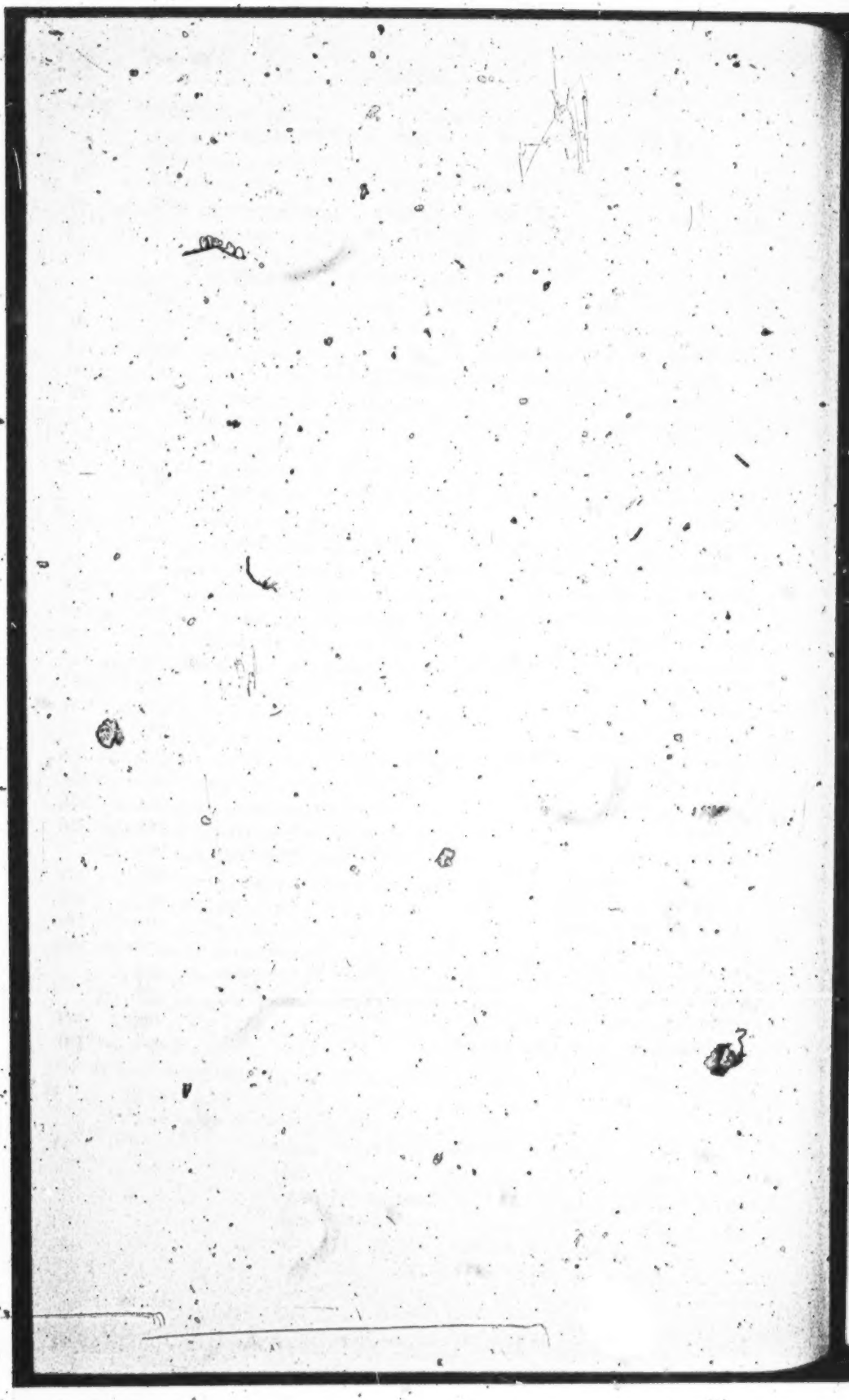

[fols. a-1-3] [Captions omitted]

[fol. 4]

IN SUPERIOR COURT OF HILLSBOROUGH COUNTY

SPECIAL APPEARANCE FOR DEFENDANT

The defendant in the above entitled action hereby appears specially, not submitting itself generally to the jurisdiction of this Court, but for the purpose of effecting the removal of this action to the District Court of the United States for the District of New Hampshire.

Bradford Electric Light Company, Inc., by Hughes & Burns, Its Attorneys.

IN SUPERIOR COURT OF HILLSBOROUGH COUNTY, JANUARY TERM, 1928

JENNIE M. CLAPPER, Admx. Est. of Leon J. Clapper,

v.

BRADFORD ELECTRIC LIGHT COMPANY, INC.

PETITION FOR REMOVAL TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW HAMPSHIRE

The defendant Bradford Electric Light Company, Inc., in the above entitled case petitions and represents as follows:

1. That the above entitled action is of a civil nature, and that the matter in dispute herein is claimed to exceed, exclusive of interest and costs, the sum or value of Three Thousand Dollars ($3000), and that this action is between citizens of different states.

2. That your petitioner, Bradford Electric Light Company, Inc., is informed and believes, and therefore avers, that the plaintiff is a citizen and resident of the State of New Hampshire.

3. That the defendant, Bradford Electric Light Company, Inc., is a corporation existing under and by virtue of the laws of the State of Vermont, having a place of busi- [fol. 5] ness at Bradford in said State of Vermont, and is a resident and citizen of said State of Vermont.

4. That this action was started by service of a writ dated September 16, 1927, returnable to the Superior Court for said County of Hillsborough on the first Tuesday of January, 1928, and that the time within which the defendant is required to answer by the laws of the State of New Hampshire and the rules of this Court has not expired, and that the defendant has not answered nor otherwise pleaded to the declaration in said action.

5. That your petitioner, the Bradford Electric Light Company, Inc., desires to remove this action into the District Court of the United States for the District of New Hampshire, and offers herewith a bond with a good and sufficient surety for their entering into said District Court within thirty days of the filing of this petition a certified copy of the record of this action, and paying all costs that may be awarded by said District Court, if said Court shall hold that this action was wrongfully or improperly removed to it.

Wherefore your petitioner, Bradford Electric Light Company, Inc., respectfully prays that this Honorable Court to proceed no further herein except to make an order of removal, and to accept said surety and bond, and to permit a certified copy of the record herein to be removed into the said District Court of the United States for the District of New Hampshire.

Bradford Electric Light Company, Inc., by Hughes & Burns, Its Attorneys.

Duly sworn to by Stanley M. Burns. Jurat omitted in printing.

[fol. 6] IN SUPERIOR COURT OF HILLSBOROUGH COUNTY

[Title omitted]

AFFIDAVIT OF NOTICE

I, Stanley M. Burns, of the firm of Hughes & Burns, of counsel for the defendant in the above entitled action, on

oath depose and say that I have given written notice to the plaintiff of the petition and bond for removal of said action to the District Court of the United States for the District of New Hampshire, by depositing in the mail, registered, postage prepaid, on the 5th day of January, 1928, addressed to said plaintiff in care of said plaintiff's attorney, Robert W. Upton, of Concord, N. H., a letter, of which the following is a copy:

"DEAR SIR: You are hereby notified that the Bradford Electric Light Company, Inc., against which you have brought an action in favor of Jennie M. Clapper, as she is Administratrix of the Estate of Leon J. Clapper, which is now pending in the Superior Court for Hillsborough County, will, on or before Friday next, January 6th, 1928, file in said court a petition and bond, as provided by law, for the removal of said action to the District Court of the United States for the District of New Hamshire.

Very truly yours, Hughes & Burns, Attorneys for Defendant."

[fol. 7] Said letter was deposited in the mail, as aforesaid, before filing of said petition and bond.

Hughes & Burns, Attorneys for Defendant.

STATE OF NEW HAMPSHIRE,
Strafford, ss:

January 6, 1928.

Subscribed and sworn to before me,
F. Clyde Keefe, Justice of the Peace.

IN SUPERIOR COURT OF HILLSBOROUGH COUNTY

[Title omitted]

BOND ON REMOVAL—Filed Jan. 12, 1928

Know all men by these presents, that the Bradford Electric Company, Inc., a corporation duly organized and existing under the laws of the State of Vermont, the defendant in the above entitled action, and the United States Fidelity & Guaranty Company, a corporation duly organized under the laws of the State of Maryland, and having a usual place of

business in Dover in the County of Strafford and State of New Hampshire, as surety, are holden and stand firmly bound unto Jennie M. Clapper, as she is the administratrix of the estate of Leon J. Clapper, plaintiff in the above entitled action, her heirs, successors and assigns, in the sum of Five Hundred Dollars ($500), for the payment of which, well and truly to be made, we and each of us bind ourselves and our successors jointly and severally by these presents. [fol. 8] The condition of this obligation is such that whereas the said Bradford Electric Light Company, Inc., has applied by petition to the Superior Court for the State of New Hampshire in and for the County of Hillsborough for the removal of said action to the District Court of the United States for the District of New Hampshire for further proceedings on the ground in said petition set forth, and that all further proceedings in said Superior Court be stayed,

Now, therefore, if said Bradford Electric Light Company, shall enter in said District Court of the United States within thirty days from the date of filing of said petition a copy of the record in said action, and shall pay or cause to be paid all of the costs that may be awarded therein by said District Court if said District Court shall hold that said action was wrongfully or improperly removed thereto, then this obligation shall be void, otherwise it shall remain in full force and virtue.

In Witness Whereof said Bradford Electric Light Company, Inc., has caused these presents to be signed in its name and behalf, and its corporate seal to be hereto affixed, by W. A. Buttrick its President, thereto duly authorized, and the United States Fidelity and Guaranty Company has caused them to be signed in its name and behalf, and its corporate seal to be hereto affixed, by Harry P. Henderson, Attorney in Fact and Resident Agent, thereto duly authorized, this 9 day of January, 1928.

Bradford Electric Light Company, Inc., by M. A. Buttrick, President. (L. S.) United States Fidelity & Guaranty Co., by Harry P. Henderson, Attorney in Fact and Resident Agent. (L. S.)

Witness: R. Howarth.

On said twelfth day of January the plaintiff states that a hearing is desired on the petition for removal to the United

States District Court. Thereafterwards on the third day of February the bond is approved by the court, the plaintiff [fol. 9] objecting to the transfer and approval of the bond at this date, on the ground that the bond was not seasonably filed. Thereupon the following order for transfer to the United States District Court is made.

IN SUPERIOR COURT OF HILLSBOROUGH COUNTY

[Title omitted]

ORDER FOR REMOVAL

The defendant in said cause having, on the sixth day of January, 1928, filed its petition for the removal of said cause to the District Court of the United States for the District of New Hampshire, and having thereafterwards on the twelfth day of January filed a bond, and it appearing upon consideration of the said petition and bond that said petition is in due form of law; that said bond is duly conditioned; that the surety upon said bond is good and sufficient; that said cause is a proper one for removal to the said District Court, provided the application for such removal and said bond was seasonably made; (which this Court rules pro forma was seasonable,)

Now therefore it is ordered and adjudged that the prayer of said petition be granted; that the said surety and bond be and they hereby are accepted and approved, (the plaintiff objecting to the transfer and approval of the bond at this date on the ground that the bond was not seasonably filed); that said cause be and hereby is removed into the District Court of the United States for the District of New Hampshire; and that no further proceedings be had therein in this Court; and the Clerk is hereby directed to make up the record in said case for transmission to the said District Court, on this third day of February, 1928.

Attest:

Thos. D. Luce, Clerk.

[fol. 10] IN SUPERIOR COURT OF HILLSBOROUGH COUNTY

WRIT OF ATTACHMENT

THE STATE OF NEW HAMPSHIRE,
Hillsborough, ss:

[L. S.]

To the sheriff of any county or his deputy:

We command you to attach the goods or estate of Bradford Electric Light Company, Inc., a corporation duly established by law, doing business at Haverhill in the County of Grafton and State of New Hampshire to the value of Ten thousand dollars, and summon it if to be found in your precinct, to appear at the Superior Court to be holden at Manchester in said county of Hillsborough, on the first Tuesday of January 1928, to answer to Jennie M. Clapper of Manchester in the County of Hillsborough and State of New Hampshire, administratrix of the estate of Leon J. Clapper late of Bradford, Vermont.

In a plea of the case for that on to wit July 30, 1926, at to wit Haverhill in the County of Grafton and State aforesaid, said plaintiff's intestate, being then and there in the employ of the said defendant in the construction, alteration or repairs of wires or apparatus charged with electric current, was by reason of the carelessness and negligence of the said defendants, their agents and servants, so exposed to such electric current as to receive the same into and through his body from which shock said plaintiff's intestate soon after died; that by reason of the carelessness and negligence of the said defendant as aforesaid an action has accrued to said plaintiff to recover damages as she says in the sum of ten thousand dollars ($10,000.00).

We also command you to attach the money, goods, chattels, rights, and credits of the said —— —— in the hands of —— ——, to the value of — dollars, and summon said —— ——, if to be found in your precinct, to appear at said Court and show cause, if any he ha-, why execution should not issue against — for the judgment which may be recovered by said plaintiff against said principal defendant and make return of this writ, with your doings therein.

[fols. 11-20] Witness William H. Sawyer, Esquire, the sixteenth day of September 1927.

Geo. M. Fletcher, Clerk.

Dec. 1, 1927.

MERRIMACK, ss:

I then at 2.55 o'clock in the afternoon, summoned said principal defendant, Bradford Electric Light Co. Inc. as within commanded, by giving in hand to Hobart Pillsbury, Secretary of State, a true and attested copy of this writ, and I paid the Sec. of State two dollars as his fee for accepting service.

Geo. A. Wooster, Sheriff.

Fees:

Service	$.50
Copy	1.00
Miles Travel	.20
	$1.70
Pd. Sec. of State	2.00
	$3.70

6004. Writ, Jennie M. Clapper, administratrix of the estate of Leon J. Clapper, vs. Bradford Electric Light Company, Inc., and trustee. Superior Court, January Term, 1928. Jennie M. Clapper, Admx., by Her Attorney-, Joseph C. Donovan, Robert W. Upton.

[fol. 21] This action was duly entered in the December Term, 1927, when and where the parties appeared by their respective counsel.

This action was thence continued from term to term to the September Term, 1928, when on, to wit, the fourth day of September, A. D. 1928, the following Answer of Defendant, Brief Statement and Motion to Dismiss was filed.

IN UNITED STATES DISTRICT COURT, DISTRICT OF NEW HAMPSHIRE

DEFENDANT'S ANSWER, BRIEF STATEMENT, AND MOTION TO DISMISS—Filed September 4, 1928

Now comes the defendant in the above entitled action, and defends and says that it is not guilty in manner and

form as alleged by the plaintiff in her writ and declaration, and this it is ready to verify.

And further answering, the defendant says

1. That it is a corporation duly established under the laws of the State of Vermont and having a principal place of business at Bradford in said State of Vermont.

2. That Leon J. Clapper at the time of his death and for some time prior thereto was a resident of said Bradford, Vt.

3. That said Bradford Electric Light Company, Inc., hired the said Leon J. Clapper in the State of Vermont to work within and outside of said State.

4. That the said Leon J. Clapper while in the employ of said defendant was killed at Haverhill in the County of Grafton and State of New Hampshire on July 30, 1926.

5. That the defendant has accepted the provisions of the Workmen's Compensation Act for the State of Vermont.

6. That the General Laws of the State of Vermont relating to Labor, Chapter 241, Section 5763, provide as follows:

Election of Employer or Employee.—The provisions of this chapter, except sections five thousand seven hundred and sixty-six, five thousand seven hundred and sixty-seven [fol. 22] and five thousand eight hundred and twenty-six, shall not apply to an employer or employee unless prior to the injury they shall have so elected by agreement, either express or implied, as hereinafter provided. Such agreement shall be a surrender by the parties thereto of their rights to any other method, form or amount of compensation or determination thereof than as provided in this chapter, and shall bind the employee himself, his widow, the employee's widower, personal representative, and next of kin and dependents as hereinafter defined, as well as the employer and those conducting his business during bankruptcy or insolvency."

7. That the General Laws of the State of Vermont relating to Labor, Chapter 241, Section 5765, provide as follows:

"Same; as to Contracts Made Subsequent to July First, Nineteen Hundred and Fifteen.—Every contract of hiring, verbal, written or implied, made subsequent to July first,

nineteen hundred and fifteen, shall be presumed to have been made subject to the provisions of this chapter, unless there is, as a part of such contract, an express statement in writing prior to accident, either in the contract itself or by written notice by either party to the other and to said commissioner, that the provisions of this chapter, other than sections five thousand seven hundred and sixty-six, five thousand seven hundred and sixty-seven and five thousand eight hundred and twenty-six, are not intended to apply, and it shall be presumed that the parties have elected to be subject to the provisions of this chapter and to be bound thereby. In the employment of minors, this chapter shall be presumed to apply unless the notice is given by or to the parent or guardian of the minor. The agreement for the operation of the provisions of this chapter, other than sections five thousand seven hundred and sixty-six, five thousand seven hundred and sixty-seven and five thousand eight hundred and twenty-six, may be terminated by either party upon sixty days' notice to the other and to said commissioner, in writing prior to any accident."

[fol. 23] 8. That the General Laws of the State of Vermont relating to Labor, Chapter 241, Section 5770, provide as follows:

"Injuries Outside of State.—If a workman who has been hired in this state receives personal injury by accident arising out of and in the course of such employment, he shall be entitled to compensation according to the law of this state even though such injury was received outside of this state."

9. That the General Laws of the State of Vermont relating to Labor, Chapter 241, Section 5774, provide as follows:

"Right to Compensation Exclusive.—The rights and remedies granted by the provisions of this chapter to an employee on account of a personal injury for which he is entitled to compensation under the provisions of this chapter, shall exclude all other rights and remedies of such employee, his personal representatives, dependents or next of kin, at common law or otherwise on account of such injury. Employers who hire workmen within this state to work outside of the state, may agree with such workmen that the remedies under the provisions of this chapter shall be ex-

clusive as regards injuries received outside this state by accident arising out of and in the course of such employment, and all contracts of hiring in this state shall be presumed to include such an agreement."

10. That the General Laws of the State of Vermont relating to Labor, Chapter 241, Section 5762, provide as follows:

"General Powers of Commissioner.—Questions arising under the provisions of this chapter, if not settled by agreement of the parties interested therein with the approval of said commissioner, shall, except as otherwise provided, be determined by said commissioner. The decisions of said commissioner shall be enforceable by the county court under the provisions of section five thousand eight hundred and nine. From such a decision an appeal shall lie in the same manner as other appeals from said commissioner; but in no case shall such an appeal operate as a supersedeas or stay unless said commissioner or the court to which such appeal is taken, shall so order."

[fol. 24] 11. That the said Leon J. Clapper was subject to the provisions of the Workmen's Compensation Act of said State of Vermont as he had not filed with his employer or with the Commissioner of said State of Vermont, before the injury complained of, a declaration electing not to accept the provisions of the Workmen's Compensation Act of said State of Vermont as provided by said Act, and as further provided by said Act was presumed to have been operating under the contract of employment as defined by the Compensation Act.

12. That to permit the said plaintiff to maintain her common law action would be

(a) Contrary to the laws of the State of Vermont, the said Leon J. Clapper having at the time of his death accepted the provisions of the Workmen's Compensation Act for said State,

(b) A breach of his agreement with said Bradford Electric Light Company, Inc., to accept compensation under the provisions of the Workmen's Compensation Act, and

(c) Would work a great hardship, and perpetrate a fraud on said Bradford Electric Light Company, Inc.

13. That the acceptance of the provisions of the Workmen's Compensation Act for said State of Vermont by the said Leon J. Clapper, as above specifically set forth, is a bar to the plaintiff's present common law action.

14. That this Court has no jurisdiction over the parties to, or the subject matter of, said suit.

Wherefore said defendant prays that the Court dismiss the plaintiff's common law action, and for such other and further relief as may be just.

Bradford Electric Light Company, Inc., by Hughes & Burns, Its Attorneys.

[fol. 25] IN UNITED STATES DISTRICT COURT

PLAINTIFF'S MOTION TO REJECT DEFENDANT'S ANSWER AND BRIEF STATEMENT—Filed September 4, 1928

Now comes the plaintiff and moves that the brief statement of defense submitted by the defendant under the plea of the general issue be rejected for the following reasons:

(1) That the Workmen's Compensation Law of Vermont has no extra-territorial force or effect and does not control the rights of the parties in this litigation.

(2) That the rights of the parties to this action are determinable solely by the Laws of the State of New Hampshire.

(3) That the plaintiff's cause of action accrued under and by virtue of the Laws of New Hampshire, the injury causing the death of the plaintiff's intestate occurring while he was employed within said State.

(4) That the matters set forth in the defendant's brief statement do not constitute a valid and legal defense to the plaintiff's cause of action.

Jennie M. Clapper, Administratrix, by Her Attorneys, Joseph C. Donovan, Robert W. Upton.

And on said fourth day of September, A. D. 1928, this cause came on to be heard before the Court, the Honorable

George F. Morris, District Judge, on Defendant's Motion to Dismiss and Plaintiff's Motion to Reject Defendant's Answer. Decision was reserved.

Thereafter on, to wit, the fifth day of September A. D. 1928, Plaintiff's Motion to Reject Answer of Defendant [fol. 26] was granted, subject to Defendant's exception, by the Court, the Honorable George F. Morris, District Judge.

And on said fifth day of September, A. D 1928, the following Rescript was filed by the Honorable George F. Morris, District Judge, denying Defendant's Motion to Dismiss, subject to Defendant's exception.

IN UNITED STATES DISTRICT COURT

RESCRIPT—Filed September 5, 1928

This matter came on for hearing upon plaintiff's motion to reject the defendant's answer filed under the general issue.

Upon hearing the parties it appears that the special matter pleaded which is really a plea to the jurisdiction to the Court must be overruled and the case set for trial on its merits.

Actions under the Employers' Liability Act in New Hampshire are based on tort not on contract and the law of Vermont has no extra-territorial effect.

It is alleged that the deceased Leon J. Clapper accepted the provisions of the Workmen's Compensation Act for the State of Vermont, but it appears from the pleadings and the argument of counsel the only acceptance upon which the defendant relies is the failure of the deceased to file a declaration electing not to accept the provisions of the Act.

Defendant's motion to dismiss is denied.

George F. Morris, U. S. District Judge.

And on said fifth day of September, A. D. 1928, the following Motion of Defendant for Plaintiff's Specification was filed, which motion was allowed by the Court, the Honorable George F. Morris, District Judge.

IN UNITED STATES DISTRICT COURT

DEFENDANT'S MOTION FOR PLAINTIFF'S SPECIFICATION—Filed and allowed September 5, 1928

Now comes the defendant in the above entitled action and respectfully requests the Court to direct the plaintiff to file [fol. 27] forthwith a specification setting forth therein reasonably complete information concerning the negligence of the defendant on which said action is founded.

Bradford Electric Light Company, Inc., by Hughes & Burns, Its Attorneys.

September 5, 1928.

Motion allowed.

George F. Morriss, U. S. District Judge.

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S SPECIFICATION—Filed September 5, 1928

Now comes the plaintiff in the above entitled action and files the following specification in support of her allegations of negligence:—

(1) That the sub-station at which plaintiff's intestate was killed was not reasonably, properly and suitably equipped,—

(a) in that the switch or "disconnect" did not serve to cut off the electric current from defendant's transformers and wires; and

(b) in that defendant's transformers, wires and appliances were so installed as to make the place unnecessarily dangerous and unsafe.

(2) That the defendant failed to give the plaintiff's intestate reasonable and proper instructions and warnings in regard to the dangers and hazards of said sub-station.

Jennie M. Clapper, Administratrix, by Her Attorneys, Robert W. Upton, Joseph C. Donovan.

[fol. 28] And on said fifth day of September, A. D. 1928, the following Motion of Defendant to Amend Answer was filed, which Motion was allowed by the Court, the Honorable George F. Morris, District Judge.

In United States District Court

Defendant's Motion to Amend Answer—Filed and allowed September 5, 1928

[fols. 29 & 30] Now comes the defendant in the above entitled action and moves to amend its answer as filed and by way of further answer says:

That the sole and proximate cause of the death of the said Leon J. Clapper was his own negligence and not that of the defendant as alleged in plaintiff's writ, declaration and specification, and this it is ready to verify.

Bradford Electric Light Company, Inc., by Hughes & Burns, Its Attorneys.

September 5, 1928.

Motion allowed.

George F. Morris, U. S. District Judge.

And on said fifth day of September, A. D. 1928, a jury of twelve men was duly empanelled and sworn to try the issues in this case, and trial was commenced before the Honorable George F. Morris, District Judge, at Concord, and evidence was introduced before said jury.

[fol. 31] Thereafter on, to wit, the fourteenth day of September, A. D. 1928, trial of this case was terminated. The jury reported that they were unable to agree upon a verdict and were discharged from further consideration of the case.

Said action was thence continued to the October Term, [illegible] to wit, the twenty-third day of October, A. D. [illegible] a jury of twelve men was duly empanelled and sworn [illegible] issues in this case, and trial was commenced [illegible] the Honorable George F. Morris, District Judge, at

Littleton, and evidence was introduced before said jury. [fols. 32-34] Thereafter on, to wit, the twenty-fourth day of October, A. D. 1928, Defendant filed the following Motion to Further Amend Answer, which Motion was allowed by the Court, the Honorable George F. Morris, District Judge.

IN UNITED STATES DISTRICT COURT

DEFENDANT'S MOTION TO FURTHER AMEND ANSWER—Filed and Allowed October 24, 1928

Now comes the defendant in the above entitled action and moves to further amend its answer by adding thereto the following:

1. That the decedent, Leon J. Clapper, knew, or by the exercise of ordinary care could and should have known, all of the dangers and hazards incident to the work which he was performing at the time of his death and assumed the risks incident thereto.

2. That the decedent, Leon J. Clapper, was injured through his own contributory negligence.

Bradford Electric Light Company, Inc., by Hughes & Burns, Its Attorneys.

October 24, 1928.

Within motion allowed.

George F. Morris, U. S. District Judge.

[fol. 35] IN UNITED STATES DISTRICT COURT

VERDICT—Filed October 26, 1928

The Jury find in favor of the Plaintiff and assess damages in the sum of eight hundred and fifty dollars and — cents.

George W. Lamprey, Foreman.

IN UNITED STATES DISTRICT COURT

MOTION TO SET ASIDE VERDICT—Filed October 27, 1928

Now comes the plaintiff in the above entitled case and moves that the verdict be set aside for the following reasons:

(1) That the jury in assessing damages fell into a plain mistake;

(2) That the damages are inadequate;

(3) That the verdict is against the weight of the evidence.

(4) That the verdict is contrary to the law and the evidence.

Jennie M. Clapper, Administratrix of the Estate of Leon J. Clapper, by Her Attorneys, Robert W. Upton, Joseph C. Donovan.

This action was thence continued to the December Term, 1928, when on, to wit, the fourteenth day of December, A. [fol. 36] D. 1928, this cause came on for hearing before the Court, the Honorable George F. Morris, District Judge at Concord, on Plaintiff's Motion to Set Aside the Verdict. Decision was reserved.

Thereafter on, to wit, the eleventh day of April, A. D. 1929, the following Order of Court was entered by the Honorable George F. Morris, setting aside the verdict of the jury unless the defendant pay and the plaintiff accept fifteen hundred dollars within fifteen days.

IN UNITED STATES DISTRICT COURT

ORDER OF COURT SETTING ASIDE VERDICT—April 11, 1929

G. F. M.

In the above entitled action the jury returned a verdict of $850. The action was one for negligence resulting in the death of plaintiff's intestate Leon J. Clapper.

The case has been twice tried. At the first trial the jury disagreed. At the second trial there was a verdict for the plaintiff for $850. Plaintiff moves to set aside the verdict as inadequate.

It is argued that the verdict should be set aside as to damages only and be allowed to stand as to liability citing Doody v. Railroad, 77 N. H. 161.

Counsel concede that the Court's instructions to the jury on the question of damages were correct, but that they disregarded the Court's instructions and fell into an error because of the argument of defendant's counsel that the plaintiff and her brother were seeking to recover in this action what they would have inherited from the deceased if he had lived. No exception was taken to this argument. The Court's attention was not specifically called to it otherwise a correction would undoubtedly have been made.

I cannot find that the inadequacy of the verdict was due to this argument alone. The fact that this was the second trial, the first resulting in a disagreement, convinces me that the verdict was more of a compromise on the question of liability than upon the question of damages.

Of course it is not for the Court to substitute its judgment for the jury. I cannot however, overlook the fact that there have been two trials of the case and that at the very threshold of the case there is an important question [fols. 37 & 38] of law. Under such circumstances counsel for the parties should always take into consideration and weigh the chances on one side and the other as to what the case is reasonably worth to their client. I realize that this is not a question for the Court. However, it is a function of the Court to terminate litigation if it can be done amicably.

Therefore it is ordered that the verdict of the jury be set aside unless within 15 days of the filing of this order the defendant agrees to pay and the plaintiff agrees to accept the sum of $1500 in settlement of the action.

Thereafter on, to wit, the twenty-seventh day of April, A. D. 1929, verdict was set aside in accordance with Order

of Court entered by the Honorable George F. Morris, District Judge, on April 11, 1929.

This action was thence continued from term to term to the September Term, 1929, when on, to wit, the third day of September, A. D. 1929, a jury of twelve men was duly empanelled and trial was commenced at Concord before the Honorable George F. Morris, District Judge, and evidence was introduced before said jury.

[fol. 39] IN UNITED STATES DISTRICT COURT

VERDICT—Filed September 7, 1929

The Jury find in favor of the Plaintiff and assess damages in the sum of Four Thousand dollars and — cents.

Fred E. Knight, Foreman.

[fol. 40] IN UNITED STATES DISTRICT COURT

JUDGMENT—December 9, 1929

It is considered by the Court, the Honorable George F. Morris, District Judge, that the plaintiff have judgment on the verdict and recover of the defendant the sum of Four Thousand Sixty Dollars ($4060) and costs of suit taxed at $— under Rule 22.

A true record.
Attest:

Thomas B. Donnelly, Clerk.

[fol. 41] Thereafter on, to wit, the fourth day of January, A. D. 1930, Defendant files the following Bill of Exceptions, the time for filing Bill of Exceptions having been extended by the Court, the Honorable George F. Morris, District Judge, which Bill of Exceptions is thereafter on, to wit, the twentieth day of January, A. D. 1930, allowed by the Court, the Honorable George F. Morris, District Judge:

In United States District Court

Defendant's Bill of Exceptions—Filed January 4, 1930. Allowed January 20, 1930

This is an action which was originally brought in the Superior Court for the County of Hillsborough in the State of New Hampshire, by Jennie M. Clapper of Manchester in said County of Hillsborough against the Bradford Electric Light Company, Inc., in which it was alleged in the plaintiff's writ and declaration that it was a corporation duly established by law, doing business at Haverhill, in the County of Grafton and State of New Hampshire, by a writ dated September 16, 1927, in which the declaration was as follows:

"In a plea of the case for that on to wit, July 30th, 1926, at to wit, Haverhill, in the County of Grafton and state aforesaid, said plaintiff's intestate being then and there in the employ of said defendant in the construction, alteration or repairs of wires or apparatus charged with electric current, was by reason of the carelessness and negligence of said defendants, their agents and servants, so exposed to such electric current as to receive the same into and through his body, from which shock said plaintiff's intestate soon after died; that by reason of the carelessness and negligence of said defendant as aforesaid an action has accrued to said plaintiff to recover damages as she says in the sum of Ten Thousand Dollars,"

said writ being returnable at the Su[illegible]r Court to be holden at Manchester in said County of Hillsborough on the first Tuesday of January, 1928.

[fol. 42] On January 6, 1928, in accordance with the statutory provisions made and provided, the defendant appeared specially and filed a petition for the removal of said action to the District Court of the United States for the District of New Hampshire. The defendant's motion to transfer said action from the Superior Court of Hillsborough County in said State of New Hampshire to the United States District Court for the District of New Hampshire was granted on the ground of diversity of citizenship, the said plaintiff, Jennie M. Clapper, being a resident and

citizen of Manchester in said County of Hillsborough and State of New Hampshire, as above set forth, and the Bradford Electric Light Company, Inc., being a corporation organized under the laws of the State of Vermont and being a resident and citizen of Bradford in said State of Vermont.

On February 16, 1928, the removal record from said County of Hillsborough of said action was filed in the United States District Court for the District of New Hampshire by defendant, and on February 18, 1928, the appearance of Hughes & Burns of Dover, County of Strafford, State of New Hampshire, was entered as of counsel for the defendant, and on April 25, 1928, Joseph C. Donovan and Robert W. Upton, both of Concord, County of Merrimack and State of New Hampshire, entered their appearance as of counsel for the plaintiff.

The case was tried before the Honorable George F. Morris, District Judge, at said Concord, on September 3rd to 7th, 1929, inclusive, and the jury returned a verdict in favor of the plaintiff in the sum of Four Thousand Dollars.

The following record of the proceedings shows all of the pleadings introduced by either party and all of the material evidence bearing upon the questions herein raised by the defendant which, as hereinafter more particularly appears, includes the exceptions to the denial of the Court to grant defendant's motion to dismiss; the defendant's exception to the Court's granting plaintiff's motion to reject defendant's brief statement; the defendant's exception to the findings by the Court with reference to denying defendant's motion to dismiss; the overruling of defendant's demurrer; the denial of defendant's motion at the close of all the evidence to withdraw issues from the jury; the denial of defendant's motion at the close of all the evi- [fol. 43] dence for a directed verdict in its favor, and denial of defendant's motion to set aside the verdict of the jury; to the admission and exclusion of evidence, the defendant's requests for instructions, to the argument of counsel for the plaintiff to the jury and the judge's charge to the jury.

During the course of the trial as shown by the pleadings and by the record exceptions were taken by the defendant which are intended to be relied upon.

(1) That the Court against the seasonable objection and exception of defendant denied the defendant's brief statement and motion to dismiss which was as follows:

"Now comes the defendant in the above entitled action, and defends and says that it is not guilty in manner and form as alleged by the plaintiff in her writ and declaration, and this it is ready to verify.

And further answering, the defendant says

1. That it is a corporation duly established under the laws of the State of Vermont and having a principal place of business at Bradford in said State of Vermont.

2. That Leon J. Clapper at the time of his death and for some time prior thereto was a resident of said Bradford, Vt.

3. That said Bradford Electric Light Company, Inc., hired the said Leon J. Clapper in the State of Vermont to work within and outside of said State.

4. That the said Leon J. Clapper while in the employ of said defendant was killed at Haverhill in the County of Grafton and State of New Hampshire on July 30, 1926.

5. That the defendant has accepted the provisions of the Workmen's Compensation Act for the State of Vermont.

6. That the General Laws of the State of Vermont relating to Labor, Chapter 241, Section 5763, provide as follows:

Election of Employers or Employee.—The provisions of this chapter, except sections five thousand seven hundred and sixty-six, five thousand seven hundred and sixty-seven and five thousand eight hundred and twenty-six, shall not [fol. 44] apply to an employer or employee unless prior to the injury they shall have so elected by agreement, either express or implied, as hereinafter provided. Such agreement shall be a surrender by the parties thereto of their rights to any other method, form or amount of compensation or determination thereof than as provided in this chapter, and shall bind the employee himself, his window, the employee's widower, personal representative, and next of kin and dependents as hereinafter defined, as well as the

employer and those conducting his business during bankruptcy or insolvency.'

7. That the General Laws of the State of Vermont relating to Labor, Chapter 241, Section 5765, provide as follows:

'Same; as to Contracts Made Subsequent to July First, Nineteen Hundred and Fifteen.—Every contract of hiring, verbal, written or implied, made subsequent to July first, nineteen hundred and fifteen, shall be presumed to have been made subject to the provisions of this chapter, unless there is, as a part of such contract, an express statement in writing prior to accident, either in the contract itself or by written notice by either party to the other and to said commissioner, that the provisions of this chapter, other than sections five thousand seven hundred and sixty-six, five thousand seven hundred and sixty-seven and five thousand eight hundred and twenty-six, are not intended to apply, and it shall be presumed that the parties have elected to be subject to the provisions of this chapter and to be bound thereby. In the employment of minors, this chapter shall be presumed to apply unless the notice is given by or to the parent or guardian of the minor. The agreement for the operation of the provisions of this chapter, other than sections five thousand seven hundred and sixty-six, five thousand seven hundred and sixty-seven and five thousand eight hundred and twenty-six, may be terminated by either party upon sixty days' notice to the other and to said commissioner, in writing prior to any accident.'

[fol. 45] 8. That the General Laws of the State of Vermont relating to Labor, Chapter 241, Section 5770, provide as follows:

'Injuries Outside of State.—If a workman who has been hired in this state receives personal injury by accident arising out of and in the course of such employment, he shall be entitled to compensation according to the law of this state even though such injury was received outside of this state.'

9. That the General Laws of the State of Vermont relating to Labor, Chapter 241, Section 5774, provide as follows:

'Right to Compensation Exclusive.—The rights and remedies granted by the provisions of this chapter to an employee on account of a personal injury for which he is entitled to compensation under the provisions of this chapter, shall exclude all other rights and remedies of such employee, his personal representatives, dependents or next of kin, at common law or otherwise on account of such injury. Employers who hire workmen within this state to work outside of the state, may agree with such workmen that the remedies under the provisions of this chapter shall be exclusive as regards injuries received outside this state by accident arising out of and in the course of such employment, and all contracts of hiring in this state shall be presumed to include such an agreement.'

10. That the General Laws of the State of Vermont relating to Labor, Chapter 241, Section 5762, provide as follows:

'General Powers of Commissioner.—Questions arising under the provisions of this chapter, if not settled by agreement of the parties interested therein with the approval of said commissioner, shall, except as otherwise provided, be determined by said commissioner. The decisions of said commissioner shall be enforceable by the county court under the provisions of section five thousand eight hundred and nine. From such a decision an appeal shall lie in the same manner as other appeals from said commissioner; but in no case shall such an appeal operate as a supersedeas or stay unless said commissioner or the court to which such appeal is taken, shall so order.'

[fol. 46] 11. That the said Leon J. Clapper was subject to the provisions of the Workmen's Compensation Act of said State of Vermont as he had not filed with his employer or with the Commissioner of said State of Vermont, before the injury complained of, a declaration electing not to accept the provisions of the Workmen's Compensation Act of said State of Vermont as provided by said Act, and as further provided by said Act was presumed to have been operating under the contract of employment as defined by the Compensation Act.

12. That to permit the said plaintiff to maintain her common law action would be

(a) Contrary to the laws of the State of Vermont, the said Leon J. Clapper having at the time of his death accepted the provisions of the Workmen's Compensation Act for said State,

(b) A breach of his agreement with said Bradford Electric Light Co npany. Inc., to accept compensation under the provision of the Workmen's Compensation Act, and

(c) Would work a great hardship, and perpetrate a fraud on said Bradford Electric Light Company, Inc.

13. That the acceptance of the provisions of the Workmen's Compensation Act for said State of Vermont by the said Leon J. Clapper, as above specifically set forth, is a bar to the plaintiff's present common law action.

14. That this Court has no jurisdiction over the parties to, or the subject matter of, said suit.

Wherefore said defendant prays that the Court dismiss the plaintiff's common law action, and for such other and further relief as may be just."

(2) That the Court, against the seasonable objection and exception of defendant, granted plaintiff's motion to reject the defendant's brief statement, which was as follows:

"Now comes the plaintiff and moves that the brief statement of defense submitted by the defendant under the plea of the general issue be rejected for the following reasons:

(1) That the Workmen's Compensation Law of Vermont has no extra-territorial force or effect and does not control the rights of the parties in this litigation.

[fol. 47] (2) That the rights of the parties to this action are determinable solely by the Laws of the State of New Hampshire.

(3) That the plaintiff's cause of action accrued under and by virtue of the Laws of New Hampshire, the injury causing the death of the plaintiff's intestate occurring while he was employed within said State.

(4) That the matters set forth in the defendant's brief statement do not constitute a valid and legal defense to the plaintiff's cause of action."

(3) That the Court, against the seasonable objection and exception of defendant, denied the defendant's motion to dismiss based upon the grounds stated in its rescript which was as follows:

"This matter came on for hearing upon plaintiff's motion to reject the defendant's answer filed under the general issue.

Upon hearing the parties it appears that the special matter pleaded which is really a plea to the jurisdiction to the Court must be overruled and the case set for trial on its merits.

Actions under the Employees' Liability Act in New Hampshire are based on tort not on contract and the law of Vermont has no extra-territorial effect.

It is alleged that the deceased Leon J. Clapper accepted the provisions of the Workmen's Compensation Act for the State of Vermont, but it appears from the pleadings and the argument of counsel the only acceptance upon which the defendant relies is the failure of the deceased to file a declaration electing not to accept the provisions of the Act.

Defendant's motion to dismiss is denied."

(4) That the Court, against the seasonable objection and exception of defendant, overruled the defendant's demurrer, which was as follows:

"Now comes the defendant in the above entitled action and demurs to the Plaintiff's Declaration and assigns therefor the following reasons:

1. That said declaration is not sufficient in law.

2. That said declaration fails to state the ground of negligence upon which the defendant is chargeable in Law.

[fols. 48-53] 3. That said declaration fails to state any negligence upon which the liability of the defendant can be predicated.

4. That said declaration fails to state the nature of the negligence of the defendant on which said action is founded.

[fols. 54 & 55] Wherefore said defendant prays that the foregoing bill of exceptions may be allowed.

Bradford Electric Light Company, Inc., by Hughes & Burns, Its Attorneys.

Jan. 20, 1930.

Bill of Exceptions examined and allowed. Exhibits to be transmitted to the Clerk of the Circuit Court of Appeals at the request of either party. Bond on appeal to be in the sum of two hundred dollars ($200).

George F. Morris, U. S. District Judge.

[fol. 56] APPENDIX

IN UNITED STATES DISTRICT COURT, DISTRICT OF NEW HAMPSHIRE

No. 564. LAW

JENNIE M. CLAPPER, Admx. of the Estate of Leon J. Clapper,

vs.

BRADFORD ELECTRIC LIGHT COMPANY, INC.

Before Honorable George F. Morris, Judge, and a Jury

PLAINTIFF'S EVIDENCE

ARTHUR J. HARDY, duly sworn, testifies as follows:

Direct examination.

By Mr. Donovan:

Q. 1. What is your full name?
A. Arthur J. Hardy.
Q. 2. Where do you live?
A. Haverhill, New Hampshire.
Q. 3. What is your occupation?
A. Carpenter.
Q. 4. Where do you live in Haverhill, New Hampshire, with reference to the substation which is located there?
A. I live on the east side of the highway.
Q. 5. And the highway runs in what direction?
A. Why, practically north and south.

Q. 6. And you live on the east side of the highway?

A. Yes.

Q. 7. And east of a substation which is located westerly of the highway?

A. Yes, sir.

[fol. 57] Q. 23. Were you familiar with the substation that was opposite your residence in 1926?

A. No more familiar with it than to know it was there; that is about all.

Q. 24. What did it consist of?

A. It consisted of two steel poles or towers and two transformers.

Q. 25. Now on the evening that Leon Clapper was killed were you in that vicinity?

A. I was up here with my daughter to the tea room.

[fol. 58] Q. 26. Whether or not the lights were off in the town of Haverhill that night?

A. They was.

Q. 29. Was your attention attracted on the evening that he met his death to anything that occurred in the vicinity of the substation?

A. Right here to this corner there was a gasoline tank and oil. I went out there to get for somebody, I could not say if gas or oil. I saw a car drive up outside the road, stop and put their lights out.

Q. 31. The car drove up on the west side of the road and stopped where t[illegible] cross is?

A. Yes, just out to the edge of the highway on the grass.

Q. 32. What did you notice after that?

A. Of course, I didn't see him go down. I heard him throw this switch. I know it was the switch. The light flashed at the top at the same time he threw it.

Q. 33. Where the wires——?

A. Up on the westerly pole clear to the top.

Q. 34. And there was a flash of light when the switch was thrown?

A. Yes.

Q. 35. What else did you notice?

A. I heard him climbing the pole.

Q. 36. What could you hear?

A. I could hear his skates.

Q. 37. Some particular sound, was it?

A. Iron skates and an iron pole, making a clicking noise when they go up.

Q. 39. Sometime later was your attention called to anything that happened down to the substation?

A. Mr. Barber came up to the room and he says: "There is a man come over to fix the lights."

[fol. 59] Q. 40. Not the conversation, Mr. Hardy; just what you did?

A. I went out and I didn't have any lantern or anything. I had my car setting out here, setting where that mark is, I went out to get my flash light out of the car. Just after I was after the flash light, I heard kind of a screech or groan, one right after the other, and I hollered if he was in trouble down there. I didn't get no answer. I started right down the road on the run and Mr. Barber after me. When we got down through this orchard of the Barber place, Mr. Barber went down there over the bank and I kept going. I got down—I should say there is another little fence just below the garden that runs along through here. I got to just about that fence, and I could see up on the pole just about even with the transformers that looked like a torch or something burning. I got a little ways further. I put my flash light up. I could see something evidently up there sticking out by the transformer. About that time I stubbed my toe on the ladder that laid in the grass. I picked that up. I went a little further. I could see a man laying in between the easterly pole and the transformer that is on the westerly pole.

[fol. 60] Q. 47. About how long was it between the time when the car stopped and you heard the switch being thrown and saw the flash until you heard the scream and the groan?

A. It must have been somewhere from fifteen minutes to half an hour.

Q. 48. On which side of the Poles was this man that you saw suspended by something?

A. He was on the westerly side of the pole nearest the road.

Q. 50. On which side of the pole itself?

A. He was laying with his feet that was over one of these wires, he was laying with his head to the south, facing the highway on his side like.

Q. 51. Mr. Hardy, I show you six photographs of the sub-station and ask you to look at them and say whether they fairly represent the sub-station as it was on July 30, 1926?

A. They look about the same to me.

Mr. Donovan: We offer photographs one to six, inclusive and ask they be marked.

(Marked Plaintiff's Exhibits Nos. 1, 2, 3, 4, 5, 6.)

The Court: Any objection on the part of the defendant?

Mr. Hughes: No, your Honor.

Mr. Upton: I may say they are furnished by the defendant?

Mr. Hughes: They are similar to others used and are marked.

The Court: They may be marked.

(Marked Plaintiff's Exhibits Nos. 1, 2, 3, 4, 5, 6.)

Q. 52. I show you Plaintiff's Exhibit No. 2 and ask you to tell us from what direction that photograph was taken?

A. It was taken from the south looking north.

Q. 53. Now if you will point out the wire on that photograph on which you saw him?

A. That wire right there.

Q. 54. Indicate with a cross the wire?

A. I think it is that wire.

[fol. 61] Q. 55. You marked with a cross the wire to which you had reference?

A. I think that is the one.

Q. 56. As being the wire on which the man was suspended whom you saw the night of the accident; and on which side of the station is that wire?

A. That is on the northerly side.

[fol. 62] Q. 66. Now you spoke of seeing this man suspended on a wire on the northerly side of the transformer with reference to which cross arm was this wire attached?

A. Attached right there (indicating).

Q. 67. If you will mark that with a pencil cross.

A. (Marked.)

Q. 68. You indicated a cross arm on the northerly side of the poles with the insulators. Will you mark that.

A. (Marked.)

Q. 69. Whether or not it is on that wire that you see leading from that insulator that you saw this man?

A. He had one leg over that wire.

Q. 70. Which leg?

A. Left leg.

Q. 71. In what direction was his face?

A. He was facing toward the highway.

Q. 72. Toward the east?

A. Yes.

Q. 73. And his back was to the west, and what was his position as he was suspended there, vertical or horizontal?

A. Very near horizontal.

Q. 74. And whether or not his body was between the two transformers?

A. His body was between the easterly pole and the transformer on the westerly pole.

Q. 75. Did you notice whether any part of his clothing or anything that he wore, was caught on any other part of the apparatus?

A. He had a belt on. His belt was looped over one of the cross arms.

Q. 76. That you marked?

A. Yes.

Q. 77. Where was that with reference to the end of the pole—the pin that you speak of?

A. Toward the center.

[fol. 63] Q. 79. How was Mr. Clapper dressed?

A. As I remember, he had on one of them one-piece suits overalls and frock combined.

Q. 80. Whether or not he had on rubber gloves?

A. I couldn't say. There was a pair there.

Q. 81. How about steel skates?

A. He had those on.

Q. 82. Were you there when they lowered him to the ground?

A. Yes.

Q. 87. What burns did Mr. Clapper have?

A. He had one burn on his leg after he was lowered down.

Q. 88. Which leg?

A. Left leg, and there was a spot on his breast that I see when the doctor opened his shirt.

Q. 89. He was dead?

A. Pronounced dead, yes.

[fols. 64-70] Cross-examination:

[fol. 71] X Q. 188. Did you notice Mr. Clapper?

A. I only knew him by sight.

X Q. 189. Had he been to your place?

A. He hadn't never been to my house. He had been to the tea room.

X Q. 190. Done some work?

A. When they put the lights in there, he was there and two or three other fellows.

X Q. 191. During that summer were you acquainted with the fact that there had been some work done at the substation?

A. I had seen them working there, but I didn't know what they were doing.

X Q. 192. You didn't go down there at any time while they were there?

A. I think I went down once in the daytime. They wanted me to bring them down some ginger ale.

X Q. 193. Did you know all the men that were there?

A. I knew two or three of them by sight. I don't know as I could recall their names.

X Q. 194. Who were they you knew by sight?

A. I think the day I was down there, I was—I couldn't say what their names was, but I think Harley Moore was one of them and one fellow by the name of William Moore, I guess.

[fol. 72] X Q. 195. Mr. Clapper there?

A. I couldn't say whether he was there that day or not.

X Q. 196. You had seen him there?

A. I had seen him working down there, yes.

[fol. 73] Redirect examination:

[fol. 74] R. D. Q. 222. You said you thought you saw Mr. Clapper down in the vicinity of the substation sometime during that summer doing some work?

A. I don't know for sure whether I saw him or not. I might have.

R. D. Q. 223. What was the work that was being done there, do you know? A. I didn't even know his name until after he was killed.

R. D. Q. 224. Let me ask you, have you seen Mr. Clapper at this substation before this accident to know him?

A. Not to know him. The only way I knew him was to see fellows that you have seen working on different jobs, and you know you see the same fellow and he would speak to you and you would not know what his name was. That is one way I was acquainted with him.

R. D. Q. 225. Have you seen him to know him by sight but not by name?

A. He was here to my shop when they hitched the electric light wires on.

R. D. Q. 226. With reference to the station down there, have you seen him down there doing any work?

A. No, I haven't. I could not say I had.

Recross-examination.

By Mr. Hughes:

R. X Q. 227. It was your impression when I asked you some few minutes ago about seeing him down to the substation that you had seen him?

A. I said I might have, but I don't remember for sure.

R. X Q. 228. You saw several men down there?

A. I saw several down there, four or five.

R. X Q. 229. You didn't know any of them by name, except Moore?

A. I did know one or two of the other names, but I have forgotten them.

[fol. 75] R. X Q. 230. And how long was that before this particular accident?

A. Oh, they was working down there I think two or three months before that.

[fol. 76] Myron G. Clapper, duly sworn, testifies as follows:

Direct examination.

By Mr. Upton:

Q. 1. What is your name?

A. Myron G. Clapper.

Q. 2. You live where?

A. Newport, Vermont.

Q. 3. Your age?

A. Thirty-two.

Q. 4. What is your employment?

A. Line foreman for Newport Electric Light Company.

Q. 5. Was the young man who was electrocuted at Haverhill on July 30, 1926, your brother?

A. Yes.

[fol. 77] Q. 6. And his name was Leon J. Clapper, was it?

A. Yes.

Q. 7. How old was he at the time of his death?

A. Twenty-one.

Q. 8. Did you know anything about his experience in his work before his death?

A. Yes.

Q. 9. Where had he been employed to your knowledge?

A. Employed at Newport for the Newport Electric Light Company, and he also worked for the Boston & Maine Railroad.

Q. 14. What was the kind of work he did while with the Newport Electric Light Company?

A. At first he started in spare time. He worked nights for the railroad, and as we needed an extra man in the day time he worked with me until I guess he worked like that for a couple months and then he got regular employment.

Q. 15. What did he do?

A. Worked on the ground as ground man.

Q. 16. What was the character of that work? What did he have to do as a ground man?

A. Dug post-holes, helped set poles, a common laborer's work.

Q. 17. And his work took him up the poles?

A. No, sir.

Q. 18. While employed as such, have any work to do about live wires?

A. No, sir.

Q. 19. How long did he continue in this capacity?

A. He worked at Newport six or eight months, I believe, and then he went to Bradford.

Q. 20. At Newport one year or one year and six or eight months?

A. Six or eight months at Newport.

Q. 21. What did he do next?

A. He went to Bradford.

[fol. 78] Q. 22. How long was he there before his death?

A. He was there about a year or year and half.

Q. 23. When did he go to Bradford?

A. He went to Bradford in the Fall of 1924.

Q. 24. Recall the month?

A. No, I do not.

Q. 25. Continued in the employment of the Bradford Company until his death?

A. Yes, sir.

Q. 26. At any time while he was working there, were you also employed by the Bradford Company?

A. I was.

Q. 27. How long?

A. I was there in the summer of 1925.

Q. 28. How many weeks or months?

A. Three months, three or four.

Q. 29. What kind of work was your brother doing then?

A. He was doing trouble work, trouble man's work.

Q. 30. Explain—tell us what it consisted of?

A. It consisted of repairing, making new services and any trouble work that might come in that one man could attend to, and also patrolling the street lights.

Q. 31. And in making new services, would he be called on to work on or about wires charged with electricity?

A. Not more than 110 volts, I shouldn't expect.

Q. 32. In his other work whether or not he would be called to work about wires charged with electricity or apparatus?

A. I wouldn't expect so.

Q. 33. Now I show you some photographs marked Plaintiff's Exhibits Nos. 1 to six inclusive, and ask you if that shows the station at Haverhill as you saw it after your brother's death?

A. Yes, sir.

Q. 34. Were you acquainted with the situation at the substation at Haverhill before your brother's death?

A. Yes, sir.

Q. 35. Of what did this substation consist as you knew it before your brother's death?

A. It consisted of two poles, the same as there only with one transformer, a single phase system.

Q. 36. How many primary wires going into it?

A. Two.

[fol. 79] Q. 37. What changes were made in the station at sometime as shown by these photographs and by your own observations after your brother's death?

A. There was a third one run into the station and another transformer.

Q. 38. What change did that make in the station, that is, in the character of the station?

A. It made it into three phase.

Q. 39. What do you mean by three phase?

A. Three wires and in grouping any combination of two you get a phase, and in so doing you get three phases of our circuit.

Q. 40. As you knew the station before the accident, when it had but one transformer there, what provision, if any, was there for disconnecting the electricity from the station?

A. There was a disconencting switch mounted there at the pole.

Q. 41. Will you tell me what that switch was and how it operated?

A. It consisted of the switch blades, that is, a blade for each wire coming down from the main line, 13,200 volts, and there was a pipe or rod with the handle attached nearer the ground where a man could take hold of the handle, swing it one way, and open the circuit, and in so doing not let any current into the substation.

Q. 42. Could the circuit be opened or broken by the switch, what was the process?

A. By turning this handle, connecting rod up to the switch blades, turning it one way would swing the blades out, and that would leave an open circuit between two points, wires coming down to the substation.

Q. 43. Was the switch closed or blades thown back, what was the situation?

A. Closed your circuit and let the current into the station.

Q. 44. What was the function of the transformer that was there, what did that do?

A. That stepped that ground down from 13,200 volts to 2,300 volts.

Q. 45. And the current as transformed, reduced, was taken out of the station on wires?

A. Yes, sir.

[fol. 80] Q. 46. And in a general way where did those wires go.

A. The secondary wires fed Haverhill and that vicinity.

Q. 47. You have referred to the secondary wires, and I refer to the primaries. What do they mean with reference to this station?

A. The secondary wires are low voltage wires, 2,300 volts; the primary would be the high voltage or 13,200 volts.

Q. 48. Now you helped to prepare a sketch of this station, a drawing?

A. Yes, sir.

Q. 49. This drawing shows the station as it appears in these photographs?

A. Yes.

Q. 50. As you saw it after your brother's death?

A. Yes, sir.

Q. 51. Commencing at the right on the plan as I face it here, what have we first in the drawing?

A. You have a steel pole with transformer and cross arms and something there to indicate the disconnecting switches.

Q. 52. The next pole is what?

A. Steel pole, transformer and cross arms.

Q. 53. Which pole?

A. That is the eastern pole.

Q. 54. The pole that is marked No. 1 would be the westerly pole?

A. Yes.

Q. 55. And the pole designated as No. 2 would be the easterly of the two poles?

A. Yes, sir.

Q. 56. And in turn the pole designated as No. 2 shows the general construction of that pole with the appliances attached.

A. Yes, sir.

Q. 57. We have these poles brought together here. What is that intended to represent?

A. Represent the substation as it looked, connected up as near as we could.

Q. 58. How can we pick out the primary wires on this drawing?

A. The primary wires.

Q. 59. The wires carrying 13,200 volts?

A. The wires coming from the west.

Q. 60. Indicated by the word Newbury?

A. Newbury.

Q. 61. Newbury was to the west?

A. Yes.

Q. 62. These wires came in through Newbury?

A. Came over from Newbury.

[fol. 81] Q. 63. How are those primary wires designated there?

A. We have a mark, 1, 3 and 2.

Q. 64. Could you tell which of those wires were in there in 1925 when you were acquainted with the station working for the company?

A. No. 1 and 2 wires were there.

Q. 65. And after your brother's death, you found a third wire which was designated as three on this drawing or plan?

A. Yes, sir.

Q. 66. The secondary wires, where are those?

A. The secondary wires lead off from the easterly pole, come up through here on these cross arms.

Q. 67. Are those designated in some way?

A. Marked S. for secondary.

Q. 68. What is the function of this station as you saw it after your brother's death, what do these transformers do?

A. They stepped the current down from 13,200 volts to 2,300 volts.

Q. 69. I ask you to refer to these photographs, Plaintiff's Exhibits 1 to 6, inclusive, and tell us if you will what kind of a disconnecting switch there was there as shown by the photographs?

A. Two poles disconnecting switches.

Q. 70. I want to know how it is installed and what there was of it?

A. It consisted of the knife blades which was in the circuit of one or two wires, a blade in each circuit here hung on insulators, and they were attached to a pipe that ran down the pole here to a switch lever handle and reached the ground, and a man taking hold of this lever and swinging it would open it; those blades breaking the current from these two wires coming down into the substation, one and two.

Q. 71. No. 3?

A. No. 3 wire was not broken. There was no switch.

Q. 72. No switch in No. 3 wire?

A. No switch in No. 3.

Q. 73. Did you yourself see the station in that condition after your brother's death?

A. Yes, sir.

[fol. 82] Q. 74. Had there been any change in this switch from 1925 when working for the company to the time when you saw it after your brother's death?

A. No, sir.

Q. 75. The switch was the same?

A. Yes, the same.

Q. 76. In the meantime a primary wire or third wire had been run into the station?

A. Yes.

Q. 77. Had there been a new transformer put in?

A. There had been one added since I was there in 1925.

Q. 78. Tell us with reference to this drawing which transformer that is?

A. I should judge it was No. 2 transformer, the easterly transformer.

Q. 79. Is the switch shown in any of these photographs?

A. Yes, sir.

Q. 80. Will you pick out the one which shows the switch to the best advantage?

A. I think Exhibit No. 4.

Q. 81. Will you tell us where we can find the switch there?

A. The switch is on it here on top of the pole between these two cross arms. Here is one switch blade here on one wire; on the other side is the other blade.

Q. 82. Mark it. You have indicated the switch blades how?

A. With an arrow.

Q. 83. Pointing to each?

A. Pointing to each blade.

Q. 84. Those are operated by the lever rod which we see going up the westerly pole?

A. Yes, sir.

Q. 85. When there were only two wires going into this station, what effect did this switch have if it was thrown, that is, if it was open?

A. Only two wires, it would make the substation absolutely dead.

Q. 86. If a third wire was installed, what effect would throwing the switch have?

A. No effect.

Q. 87. That is, opening it?

A. No effect from the standpoint of getting a current off of any of the wires.

Q. 88. Explain a little more fully just what the effect would be?

A. It would open the circuit, so that you would get no lights or power off of your secondary wi[illegible] You would not have a completed circuit, but a man touching any of those [fol. 83] wires connected to the ground would receive a electric shock.

Q. 89. What do you mean by connected to the ground?

A. I mean standing on the steel itself or conductor to the ground and touching the wires, he would have a circuit to the ground.

Q. 90. And in that way would be exposed to the current?

A. Yes, sir.

Q. 91. If he came in contact even though the switch was thrown?

A. He would.

Q. 92. I would like to have you explain about it, how the primary wires were connected up with the transformers?

A. The primary wire No. 1 came down through disconnecting switch down the southerly side of the substation, went into No. 2 transformer. It also had a branch that came over on the north side of the substation to No. 1 transformer. No. 1 connects into No. 1 transformer, ran from No. 1 wire over to No. 2 transformer.

Q. 93. The No. 1 wire connects with both transformers?

A. It does.

Q. 94. Tell us about the No. 2 primary?

A. Two wire comes in; it is connected to a disconnecting switch, drops down on the northerly side of the substation and connects the other side of No. 1 transformer.

Q. 95. Does that wire connect with more than one transformer?

A. No, sir.

Q. 96. Only the No. 3 primary wire?

A. No. 3 primary comes directly on the pole and ran on pins and insulators down against the pole, and that goes to the southerly side of the substation and connects with No. 2 transformer.

Q. 97. Does that connect with more than one transformer?

A. No, sir, only one.

Q. 98. No. 1 and 2 come into the station on the cross arm?

A. Yes, sir, at the top.

[fol. 84] Q. 99. And how did No. 3 come in?

A. Comes in on a bracket, a pole bracket on the top of the pole.

Q. 100. No. 3 is the middle wire?

A. Yes, sir.

Q. 101. And attached to a bracket at the top of the pole?

A. Yes, sir.

Q. 102. And No. 3 in passing through No. 2 transformer takes what course from No. 1 pole, what course does it take from that pole?

A. From the pole that goes south of No. 2 pole and easterly to transformer No. 2.

Q. 103. Does it go directly to a transformer and attached to something?

A. It is attached to a cross arm and insulator on the pole No. 2.

Q. 104. How long is that cross arm?

A. I should judge about four or five feet.

Q. 105. And that would bring the No. 3 wire how far from the pole?

A. About two feet.

Q. 106. You have spoken of No. 1 wire passing, one portion of it into the No. 1 transformer and another portion of it into the No. 2 transformer. What is the course that takes into the No. 2 transformer?

A. It breaks off from coming down the pole, on the pins and insulators on the No. 1 pole and comes to a cross arm on No. 2, tied in on the insulator and that to No. 2 transformer.

Q. 107. And that insulator is about how far from No. 2 pole?

A. About two feet.

Q. 108. The wire at that point is about two feet from the pole?

A. Yes, sir.

Q. 109. Is any part of this station equipped with fuses?

A. There are fuses on the No. 2 pole, at the top of the pole on the cross arm.

Q. 110. What is the function of those fuses?

A. To protect the line from—in other words, if anything happens on *on* the line beyond these fuses, it breaks the fuse down and does not interrupt the rest of the service.

. . . . . .

Q. 112. You stated if anything happened these fuses break down, what did you mean by that?

[fol. 85] A. If a wire breaks or lightning comes in on the wires, it is apt to blow the fuses or a tree down on the line, an overload.

Q. 113. What happens if a fuse breaks down, what mechanically happens?

A. In each of these pieces there is what we call a fuse block; that is connected up with fuse wires that is rated for so many amperes or carrying capacity or whatever the line requires, and that fuse wire which is no more than solder just melts; it opens the line.

Q. 114. Breaks the connection?

A. Breaks the connection.

Q. 115. If these fuse blocks break down, what has to be done to establish a circuit?

A. A man has to go there and refuse the plugs.

Q. 116. How about these particular fuses, they are reached in what way?

A. Climbing the pole.

Q. 117. Which pole?

A. No. 2 pole.

Q. 118. That is, easterly pole?

A. Easterly pole.

Q. 119. Are you familiar with the devices employed for climbing such poles?

A. Yes, sir.

Q. 120. Let me ask you what it is?

A. It is steel; they call it a skate or climber; it goes on the bottom of the foot.

Q. 121. How are they used in climbing a pole of this type?

A. It goes on the edge of the flange. It works on a clamp idea.

[fol. 86] Q. 132. You have told me that with a station such as shown by these photographs, Plaintiff's Exhibits Nos. 1 to 6, inclusive, if the switch was thrown the station would not be free from current. Is that a fact?

A. Yes.

Q. 133. I would like you to explain how the switch thrown or open, in that way wires 1 and 2 severed, the station could still be charged with current?

A. With your switch in the open position, that is, open No. 1 wire and No. 2, and No. 3 wire ran directly through, you would get current on your No. 3 wire to feed into No. 2 transformer through the primary coils and out to the opposite side of the transformer through No. 1 wire and No. 1 wire in turn goes to No. 2 transformer.

Q. 134. Haven't you got the numbers of those transformers wrong?

A. Goes to No. 1 transformer.

Q. 135. No. 1 wire?

A. Feeds into No. 1 transformer, goes out on the opposite side of the transformer onto No. 2 wire, and that would make this No. 2 wire alive to the bottom of the disconnecting switch and also No. 1 wire alive to the bottom of the disconnecting switch: in other words, you would have 13,200 volts on all your primary wires.

[fol. 87] By the Court:

Q. 136. In passing through those transformers, wouldn't that be stepped down to 2,300?

A. I mean that on the secondary side of the transformer you would get your secondary voltage; that is, there would be a voltage on the secondary wires.

Q. 137. And on the primary wires?

A. And on the primary wires you would get 13,200.

Q. 138. On the secondary wires, you get how much?

A. The limit you would be able to get would be 2,300 volts.

By the Court:

Q. 139. I call your attention to Plaintiff's Exhibit No. 5. Are you able to pick out on that the primary wires?

A. Yes, sir.

Q. 140. And some of the secondary wires?

A. Yes, sir.

Q. 141. And will you mark them indicating them in the same way as they are shown on the plan. You have done what to this exhibit, Plaintiff's Exhibit No. 5?

A. I have indicated the primary wires as 1, 2 and 3 and the secondaries with the letter S, three secondary wires.

Q. 142. You have told us, I believe, that primary wire No. 1 is the wire that divides or connects with both transformers?

A. Yes.

Q. 143. Will you also indicate the division, the parts that extend to the transformers. Referring to the drawing, Plaintiff's Exhibit No. 8, which side of the station is shown?

A. It shows the north side of the substation.

Q. 144. And on which side of that substation does that portion of No. 1 wire pass which goes to No. 2 transformer?

A. It is on the north side of the substation.

Q. 145. I call your attention to Plaintiff's Exhibits 1 and 2 and particularly to the wire designated with a cross. Are you able to tell us what wire that is?

A. That is No. 1 primary wire.

Q. 146. Will you please indicate with a one, so that we may know it when we look at the photograph. What portion of No. 1 wire is this which you have designated with a one on these exhibits 1 and 2 and which have been previously designated by a cross?

A. It is the branch wire No. 1 going to the insulator and [fol. 88] cross arm of pole No. 2 into transformer No. 2.

Q. 147. In Plaintiff's Exhibit No. 2, this wire is shown properly below the level of the transformer and in Plaintiff's Exhibit No. 1 is properly above the level of the transformer. Why does it appear at the different levels?

Mr. Hughes: I object.

Q. 148. What level did that wire pass?

A. It passed below the top of the transformer.

Q. 149. How near the top?

A. I should say may be ten or twelve inches from the top.

Q. 150. When you saw this station after your brother's death, did any of these wires have any insulation?

A. Yes, sir.

Q. 151. What kind of insulation?

A. Water proof insulation.

Q. 152. Whether or not that is effective against current?

A. No, it is not.

Q. 153. What do you mean, explain?

A. That the insulation would be no protection to a man coming in contact with a wire that is to ground.

Q. 154. That is, if a man himself were in contact with the ground or a good contact with a ground?

A. Yes.

[fol. 89] Q. 163. Taking this station as it is shown in these photos 1 to 6, inclusive, assuming that a man went there to replace a fuse, that before climbing the pole he threw the switch, opening the blade, that is, breaking the connection in wires 1 and 2, that thereafter in some way he came in contact with that portion of No. 1 wire, primary, which connects with No. 2 transformer, whether or not he would be exposed to electric shock?

A. He would.

Q. 164. Why?

A. Because No. 1 wire is charged with electricity, 13,200 volts.

Q. 165. Received how?

A. Received through the wire through the body to the ground.

Q. 166. How is the wire itself charged?

A. By No. 3 not being disconnected.

Q. 167. You started to explain how the man himself would receive a shock. What would be the course or process?

A. It would come into the body where No. 1 touched the body and leave to the steel whatever part of the structure that it might be laying on.

Q. 168. Or contact with?

A. Or contact with.

Q. 171. What was your brother's health?

A. Very good.

Q. 172. And his habits?

A. Very good.

Q. 173. Had he had any technical training?

A. None whatsoever.

Q. 174. Any knowledge except as he had acquired in his work?

A. Not that I know of.

[fol. 90] Q. 175. In checking up these wires as we go along through the trial, I am going to ask you to take Plaintiff's Exhibit No. 4 and designate the primary wires in the same way as you did on No. 5 and on your plan with No. 4?

A. I have indicated primary wires as 1, 2 and 3 and secondaries with the letter S.

Q. 176. In indicating primary wires you preserve the same order, the same method of numbering as in the other exhibits?

A. Yes, sir.

Q. 177. The secondary wires pass up the pole here designated as No. 2 wire?

A. Yes.

Q. 178. How near do they come to that pole, the approximate distance of those wires from the pole?

A. I should judge they were, the nearest one that is 12 or 15 inches of the pole.

Q. 179. That is referring to the station as you saw it after your brother's death?

A. As I remember it.

Q. 180. Taking Plaintiff's Exhibits Nos. 1 and 2, will you designate what is known as No. 3 wire, marking it as three?

A. I have marked the No. 3 wire with a figure three.

Q. 181. What, if anything, could have been done with the switch shown in these photographs, Plaintiff's Exhibits Nos. 1 to 6, inclusive, to make it an effective switch, that is, to make it so that it would cut off the current when it was thrown?

A. You have a three pole disconnecting switch.

Q. 182. Explain what you mean by that?

A. A switch blade or switch connected into each of the three wires.

Q. 183. Taking this particular switch that was there, what needed to be done if anything, to make it effective?

A. Have a switch on No. 3.

Q. 184. To be operated how?

A. To be operated the same as the switch or blades on No. 1 and 2.

Q. 185. By the same pole and same lever?

A. The same thing.

Q. 186. And if a blade or switch had been inserted in No. 3 wire and the switch had been thrown, what would have [fols. 91-98] been the condition of the station?

A. There would be no current whatsoever on the wires.

Q. 187. The station would be free from electricity?

A. Free from electricity.

Q. 188. You have stated that in your opinion with the switch thrown, the type of switch shown in these photographs, Plaintiff's Exhibits Nos. 1 to 6, inclusive, that the secondary wires would be charged?

A. I believe so.

Q. 189. Tell us whether or not the current in this wire would be as dangerous to life as in those other wires, as in the primary wires?

A. Why, you would get a severe shock on 2,300 volts.

Cross-examination.

By Mr. Hughes:

X Q. 195. Mr. Clapper, you are a brother of Leon and the family consisted of yourself and a sister who is the administratrix here?

A. Yes.

X Q. 196. There are no other members of the family?

A. No, sir.

X Q. 197. Was Leon a Newport boy?

A. He was born in Newport.

[fols. 99 & 100] X Q. 298. So that having worked there for you, he went down to work at Bradford. How far was Bradford from Newport?

A. About ninety miles.

X Q. 299. And up to the time he went to work there, had you worked there before?

A. At Bradford, no.

[fol. 101] X Q. 315. Well, now, after your brother had worked for a period of one year and a half or year, whichever you think he *he* did, he went down to Bradford. Who was in charge down there?

A. Mr. Drew was superintendent.

X Q. 316. Was Mr. Drew at the Newport plant then or was he at Bradford?

A. I think he was living in Bradford.

X Q. 317. Were you superintendent or head man at the Newport plant there?

A. I was line foreman.

X Q. 318. And who was the line foreman at Bradford at that time?

A. I think Mr. Keith was.

X Q. 319. Stephen Keith?

A. Stephen Keith.

X Q. 320. So that at the time your brother went to work at Bradford, he came under Mr. Keith's direction as chief lineman?

A. I would expect so.

X S. 324. What year did he go down to Bradford, do you recall?

A. He went in the Fall of, sometime in 1924.

X Q. 325. In the Fall of 1924?

A. Yes.

X Q. 329. Well, when you went down there in the summer of 1925, what was the work he was doing then?

A. He was doing trouble work.

X Q. 330. By trouble work, you mean trouble shooting?

A. Trouble shooting.

[fol. 102] X Q. 334. During the times that you were at Bradford then you found your brother engaged there as a trouble shooter, is that right?

A. Yes.

X Q. 335. A trouble shooter was one who was upon call, and finding that there was some electrical difficulty was supposed to go out and locate the difficulty and remove it, was he not?

A. Yes, sir.

X Q. 336. And that came both day and night in your experience, did it not?

A. Yes.

X Q. 337. And when electric wires were put out of commission by storms or other things, then the trouble shooter was supposed to go out and locate the difficulties if he could and resume the service?

A. That was his work.

X Q. 338. And that is what your brother was doing during the period that you were employed there at Bradford, was he not?

A. He was trouble shooter.

X Q. 339. When you went down to Bradford in 1925 there was this line that ran from Bradford, Vermont, to the Haverhill substation, was there not, in 1925?

A. It wasn't a separate line. There was a line from Haverhill to Woodsville, from Bradford to Woodsville and the Haverhill line, if I remember it, broke off of the main line.

[fol. 103] X Q. 340. Was the substation built at Haverhill, New Hampshire, when you were employed by the Bradford company in 1925;

A. It was built before I was there.

X Q. 341. That is, it was in operation?

A. Yes.

X Q. 342. And during that year 1925 you had occasion to go to the substation at Haverhill, New Hampshire?

A. Yes, sir.

X Q. 343. Now were there any other substations along between Bradford, Vermont, and the Haverhill substation while you were employed in 1925?

A. There was one at South Newbury, and that as I remember it opened the line between Bradford and Wells River or Woodsville, and there was another substation at Newbury.

X Q. 344. And was there any other substation except Newbury and South Newbury?

A. There was other substations. There was one at——

X Q. 345. On the way, I mean from Bradford to Haverhill, New Hampshire, substation?

A. Not that I know of.

X Q. 346. That is, there was a substation at Newbury and one at South Newbury?

A. As I remember.

X Q. 351. What lines did those switches at Newbury control?

A. I believe that switch there disconnected the town of Newbury and also the line coming back to Haverhill.

X Q. 352. So that when you were there in 1925, there was a substation at Newbury in which there was switches and those switches controlled this substation at Haverhill upon which your brother was subsequently injured and died from the effects of the injury?

A. Yes, sir.

X Q. 353. So that you could from the Newbury substation by turning those switches shut off the current at [fol. 104] Haverhill while you were employed there?

A. I understand so.

X Q. 354. Was there also a switch upon the Haverhill substation at that time?

A. Yes, sir.

X Q. 355. Did you have occasion to use it?

A. Yes, sir.

X Q. 356. What did you use it for?

A. I was working in Haverhill and in the town of Haverhill and went there to disconnect the current from going into the town of Haverhill.

X Q. 357. Did you have occasion to use the switch at Newbury?

A. No, sir.

X Q. 358. When you were working in Haverhill, do you mean that you were working upon this particular substation?

A. I was not. I was working on the line in the village of Haverhill.

X Q. 359. Did this switch at the Haverhill substation control the lines in the town of Haverhill?

A. It did.

X Q. 360. That was upon which side of the substation at Haverhill?

A. The switch?

X Q. 361. Yes.

A. It was on the western side of the substation.

X Q. 362. Then the current came from Newbury to the Haverhill substation and then was fed out through the secondaries into the town of Haverhill, is that right?

A. Yes.

X Q. 363. That is, while you were there?

A. Yes.

X Q. 364. What was there that killed the current between the Haverhill substation and the Newbury substation for you?

A. I had no occasion to kill the line between Newbury and Haverhill.

X Q. 365. You understood if you wanted to kill the substation at Haverhill you would go back to Newbury and kill it there?

A. Not the substation, no.

X Q. 366. The lines running into the substation?

A. The main lines running into this substation.

X Q. 367. That was these two wires, the primaries?

A. Yes.

X Q. 368. So that the two wires that were running into the Haverhill substation were called primary wires and [fol. 105] were carrying 13,200 volts while you were there, is that right?

A. I think it was.

X Q. 369. And there was in those primary wires, there were two disconnect switches as you call them?

A. Yes.

X Q. 370. That were operated from a cable from the switch located at the foot of the pole?

A. Yes.

X Q. 372. And that switch when it was not in operation was that locked while you were there?

A. I think they had a lock on all switches.

X Q. 373. How did you open it?

A. With a key.

X Q. 374. So that if you wanted to disconnect those switches at the top of the pole, you would use your key upon that padlock and then throw the switch over, is that correct?

A. That is correct, sir.

X Q. 375. And there was running from that switch up to those—from that lever rather up to those disconnect switches, there was a cable running, was there not?

A. There was either a cable or pipe. I don't just remember.

X Q. 380. That cable that you used there was attached to the switch, to the lever, when you threw that lever over [fol. 106] that disconnected your switches up above?

A. It threw the blades out.

X Q. 381. Those blades were of a fan shape type, were they?

A. The blade itself is a bar I should think about one inch with one quarter inch thickness and may be 12 or 15 inches long, solid bar.

X Q. 382. When those were in place and the connection was made, just how did they come into contact with the primaries?

A. The primary wire was connected to a contact. It was kind of V shape with spring contacts on each side. As the blade came down, it went into this contact.

X Q. 383. Into a slot, into the slot; then when you pulled the lever the other way, then those blades came out of that slot and there was no further connection between the substation and that primary, is that right?

A. That is correct.

X Q. 384. How would you know when those blades came out?

A. You could see them.

X Q. 385. What do you mean, you could see them?

A. You could see the blades in our position.

X Q. 386. That is to say, as you stood at the foot of the pole and used that lever as you looked up you could see that the blades were disconnected from the primary current, is that right?

A. Yes.

X Q. 387. And anybody could see that if they looked at it?

A. I think they could.

X Q. 388. Now those two wires while you were there had come into that station with a voltage of 13,200 volts, is that right?

A. That is right.

X Q. 389. And each of those wires carried that same voltage, did they?

A. They did.

X Q. 390. And when you left there in 1925 that was the arrangement at the substation, was it?

A. It was the same arrangement.

[fols. 107-109] X Q. 395. And as far as the electrical construction was concerned there at that time that switch to control those wires could have been put upon the pole one hundred yards away from that substation and used to kill the current into those primaries of the Newbury substation, couldn't it?

A. Yes.

X Q. 396. Perfectly proper, wasn't it?

A. Yes.

X Q. 397. Sometimes in the electrical work you put your switches at the substation sometimes for any reason you put them away from the substation to control wires going into the substation, don't you?

A. Yes.

X Q. 398. So that you always in the construction have a switch to which you can go to kill either the primary wires going into the substation or the station itself, that is true?

A. Yes, sir.

X Q. 399. So that this switch at Newbury that you speak about was used or when used killed both the primary wires going into the Haverhill substation and the station itself?

A. It did.

[fols. 110-113] X Q. 436. Well, now, calling your attention to those switches to which we have referred, you say that if a person comes and throws this handle here that he can see that his switches disconnect, disconnect switches, swing away from that slot and disconnect the current from the primaries to the substation, could he?

A. He could in daylight.

X Q. 437. What evidence would there be if he threw that switch handle at night?

A. There would be an arc there.

X Q. 438. By an arc, you mean that when those switches came out of the slots, they would show a light?

A. When they broke the contact, you got a small flash there.

X Q. 439. And would that arc be upon each of those switches?

A. It might be. I would expect so, yes.

X Q. 440. That is, as the switch came out of the slot it would flash up, show the disconnect?

A. It would.

[fols. 114-121] X Q. 493. Well, now, when that third wire was added there to that construction, then there was no more current going into that substation than there was when the two wires came in, was there?

A. No more voltage, no, sir.

X Q. 494. Each of those three wires carried 13,200 volts?

A. They did.

X Q. 495. And that was what you call a three phase?

A. Three phase.

X Q. 496. That is what you called it in answer to Brother Upton?

A. It is, a three phase system.

X Q. 497. You get a circuit from one and two or from two and three or from one and three?

A. That is right.

X Q. 498. And before that it was just a single circuit from one and two, is that right?

A. That is right.

X Q. 499. But each one of those wires carried the same amount of voltage?

A. The same amount.

X Q. 500. And they went into the transformer and then were changed to 2,300 out into the secondary?

A. Yes, sir.

X Q. 501. Well, then, the change as you observed it between the time that you worked there and the time you went there after your brother's death was the insertion of that third wire coming in there and the addition of the second transformer, this one here?

A. Yes, sir.

X Q. 502. And all that the installation of that third wire did was that it distributed the electrical load that came into that substation?

A. It did.

X Q. 503. That is the purpose of it?

A. To give more power, yes.

[fol. 122] Redirect examination.

By Mr. Upton:

R. D. Q. 612. Reference has been made to Mr. Drew. Where is he living now, let me ask?

A. Newport, Vermont.

R. D. Q. 613. How is he employed, if you know?

A. He is superintendent of the Newport Electric Light Company.

[fols. 123 & 124] R. D. Q. 617. What is the height of those poles?

A. About thirty feet.

R. D. Q. 618. How far are the transformers from the ground, take the top of the transformers?

A. I should judge fifteen feet.

R. D. Q. 619. You never have had an opportunity to work on the station and make measurements?

A. No.

R. D. Q. 620. You have been inquired of about fuses by Mr. Hughes and myself. Let me ask you how many fuse boxes there were out of this station at the time you were working for the Bradford Company?

A. I remember there were two fuse boxes.

R. D. Q. 621. A fuse box, for each secondary line?

A. For each secondary, 2,300 volt.

R. D. Q. 622. For each secondary wire?

A. Yes.

R. D. Q. 623. How many did you find there when you examined the station in January after the accident?

A. There was three junction boxes.

R. D. Q. 624. You mean what we have also called fuse boxes?

A. Fuse boxes.

R. D. Q. 625. And that was—How were they placed?

A. They were placed on the top, on the top cross arm No. 2 pole.

R. D. Q. 626. I want to know with reference to the lines going out, secondary lines?

A. One junction box was inserted in each wire.

R. D. Q. 627. Then there had been a third secondary wire put in as well as a third primary?

A. Yes.

R. D. Q. 628. In that third secondary you place a fuse box or junction?

A. Yes, sir.

[fol. 125] R. D. Q. 642. How much did you and your brother actually work together while at Newport, I mean to go out and do work together?

A. He was with me during that period more or less.

R. D. Q. 643. You mean actually working together?

A. Yes.

R. D. Q. 644. You have been asked about the instructions which you gave him. Did you ever warn him about the dangers of a switch with only two blades in the third phase, that is, a system where there were three wires?

A. No, I never did.

R. D. Q. 645. You spoke of him as competent to do the work as a lineman. What was a lineman's work on this Bradford line or system?

A. Why, a lineman was called on to set up poles, string wire, put up fixtures, cross arms, make services to new houses, repairing.

R. D. Q. 646. This work you have spoken of, how much would be on or about wires charged with electricity?

A. I would not expect there would be any only on 110 house service wiring.

R. D. Q. 647. In doing that work, what do you mean by that, does that mean inside work?

A. That is the outside from the building to the pole.

R. D. Q. 648. You have stated that the trouble man might be required to refuse a station such as this, that is, substations. How many substations were there in the system in 1925?

A. A substation at Haverhill, South Newbury, Newbury, Wells River, I think at Woodsville, and they had a substation below Bradford that paired into Piermont. I think there was one at Fairlee.

[fol. 126] R. D. Q. 649. What of those stations, if any, did they have disconnecting switches?

A. They had disconnecting switches at Newbury and South Newbury, and Wells River.

R. D. Q. 650. Do you know about the other stations, substations?

A. At Haverhill they had disconnecting switches and at Woodsville. I believe Piermont and Fairlee was controlled from cut outs, junction boxes.

R. D. Q. 655. These junction boxes would be where with reference to the live wires, the wires which came into the station or went out?

A. The live wires or primary would go down into the junction boxes and thru the transformer and out.

R. D. Q. 656. You might continue your explanation, if you will?

A. That as I remember was mounted on a four pin cross arm and probably would be one foot and a half or two feet away from the pole.

R. D. Q. 657. In reaching these boxes would a man have to go near these wires?

A. No.

[fol. 127] R. D. Q. 662. You have been asked about wires which come down No. 2 pole. Let me ask if primary or secondary wires?

A. Those are secondary wires

R. D. Q. 663. Was there any primary wires that come down No. 2 pole?

A. No, sir.

[fols. 128-132] R. D. Q. 669. You have been asked about the Newbury station or substation. How far is that from the Haverhill substation?

A. I should say it was probably five miles, may be six.

R. D. Q. 670. You mean one way?

A. If you—you would have to go over to South Newbury and then up from South Newbury to Newbury.

R. D. Q. 671. Then South Newbury is a substation?

A. That is a substation. That tends to cut the line that runs between Bradford and Wells River.

R. D. Q. 672. Where is the nearest substation through which the primary wires leading into the Haverhill station could have been cleared of electricity?

A. At Newbury.

R. D. Q. 673. The distance approximately five miles?

A. I should judge it was.

R. D. Q. 674. The round trip from Haverhill to Newbury would be ten miles?

A. I should expect so.

Recross-examination.

By Mr. Hughes:

R. X Q. 675. As you come down from Bradford, which substation do you pass first, Newbury or South Newbury?

A. Going from Bradford?

R. X Q. 676. Toward Haverhill, which place would you come to first?

A. You go to South Newbury going up on the Vermont side.

R. X Q. 677. Then from South Newbury over to Haverhill is how far?

A. I should judge it was two miles, two and a half.

R. X Q. 678. Now going from South Newbury to Newbury, how far is it?

A. About the same, two and a half miles, three miles.

R. X Q. 679. Two and a half or three miles?

A. I should judge so.

R. X Q. 680. So a person going from Bradford to the Haverhill substation, for instance, coming first to South Newbury, if they wanted to go to Newbury they would have to go about two miles out of the way before going to Haverhill?

A. I should expect so.

[fol. 133] WILLIAM MOORE, duly sworn, testifies as follows:

Direct examination.

By Mr. Upton:

Q. 1. What is your name?

A. William Moore.

Q. 2. Where do you live?

A. Bradford.

Q. 3. How are you employed?

A. Not just now.

Q. 4. Have you at any time worked for the defendant, the Bradford Electric Light Company, Inc.?

A. Yes, sir.

Q. 5. And about how long did you work for the Bradford company?

A. About three years.

Q. 6. When did you begin to work for them?

A. 1923 probably.

Q. 7. And you got through when?

A. About 1927.

Q. 8. What month, if you remember?

A. February, I think.

Q. 9. That would be February after Mr. Clapper's death?

A. Yes, sir.

Q. 10. While employed by the Bradford company, what work did you do?

A. Ground man.

Q. 11. And did you do anything else?

A. I run the Power station for a couple years.

Q. 12. Worked in a power station?

A. Yes.

Q. 13. Doing what there?

A. Operating.

Q. 14. Where is the power station situated?

A. Bradford.

Q. 15. And where is that with reference to Haverhill, New Hampshire?

A. South of Haverhill.

Q. 16. On the Vermont side of the Connecticut River?

A. Yes, sir.

Q. 17. Now from this power station in Bradford are there any lines running into Haverhill, New Hampshire.

A. Yes.

Q. 18. The substation at which this accident happened?

A. Yes.

Q. 19. Was there any change made in the line or lines running to this substation before this accident?

A. I don't get what you mean.

[fol. 134] Q. 20. Was the system or lines changed over in any way before the accident?

A. Not as I know of.

Q. 21. Didn't you in June and July do some work?

A. Run a wire over there.

Q. 22. What was done in a general way?

A. Ran a third wire from Newbury or somewhere in there, I don't know just where.

Q. 23. Newbury, Vermont?

A. Yes, sir, across the river to Haverhill, over through Pike; then there was a new line built from Pike to Lake Tarleton.

Q. 24. Where was this system put in operation, I mean this line running to Lake Tarleton, this new construction, when was it put in operation?

A. I think in July.

Q. 25. The July in which Mr. Clapper was killed?

A. Yes.

Q. 26. What part of the month?

A. I couldn't say.

Q. 27. Mr. Clapper was killed on July 30. Was it before his death?

A. Yes.

Q. 28. About how long before his death was the new system put in operation?

A. It might be two weeks; it might be'

Q. 32. Did you do any work on new construction, any of this new construction work?

A. Yes.

Q. 33. What did you do?

A. I worked with all the boys setting poles, rough work like that.

Q. 34. Setting poles and putting up wires?

A. Yes.

Q. 35. Did you do any work with Clapper?

A. Yes, I have worked with him.

[fol. 135] Q. 36. Where on this system that you worked on with Clapper, I mean on this new construction?

A. I worked building the new construction.

Q. 37. Doing what part?

A. As I told you, ran the wire, put on arms.

Q. 38. How many transformers were there at this substation in Haverhill before this change was made, before this line was put in and the line extended up to the Lake Tarleton Club?

A. I think there was one.

Q. 39. One transformer. Was there an additional transformer installed at this station in Haverhill in connection with this work?

A. I think so.

Q. 40. Do you know who did it? Were you present when the work was being done?

A. No, sir.

By the Court:

Q. 41. Did you see the second transformer there?

A. I saw it there, yes, sir, but I didn't call it——

The Court: The answer may stand.

By Mr. Upton:

Q. 42. You stopped working with Mr. Clapper on different portions of this line. Did Mr. Clapper while you were working with him do any work on or about this new transformer?

A. That I don't know.

Q. 43. I say while you were working with him?

A. No, sir.

Q. 44. You said you don't know who installed the transformer and connected it up?

A. No, sir.

Q. 45. Tell me what work you saw Mr. Clapper do when working with him?

A. Nothing only what I have told you.

Q. 46. Explain that.

A. Put on cross arms and tie wire and such work as that.

[fol. 136] Q. 59. What men were employed by the company in July to your knowledge were working for the company in July?

A. Well, there was Richardson.

Q. 60. Let me ask you what was Richardson's work? What did he do?

A. He was a lineman.

Q. 61. All right, what other men?

A. Barry.

Q. 62. What work did he do?

A. He was a lineman.

Q. 63. Who else was employed there. Mr. Clapper was employed, the man who got killed?

A. Yes, sir.

Q. 64. He did line work?

A. Yes, sir.

Q. 65. What other men were employed there?

A. I think there was a fellow named Wakefield. He was employed on the ground; that is all to my knowledge.

Q. 66. There was Mr. Keith?

A. Sure.

[fol. 137] Q. 67. What was his connection with the company?

A. He worked on the line the same as the rest of us.

Q. 68. Foreman or boss?

A. Yes.

Q. 69. What was his position?

A. He had charge of it all.

Q. 70. Did you have some extra assistants, if you remember, whether the three men sent down from Berlin helped in the construction work?

A. Yes, I think there was.

Q. 71. Recall their names?

A. No, I don't.

Q. 72. You recall three men that was in this construction work that was put in the summer of 1926?

A. They worked, I don't know how long.

Q. 73. Do you know just what they did?

A. Yes; they were linemen, the same as the rest of us.

Q. 74. Doing this work of construction?

A. Yes.

Q. 75. Now did you and Clapper do any work at or about this substation in 1926?

A. No, sir.

Cross-examination.

By Mr. Hughes:

X Q. 76. Did I understand that you were in the station, had charge of the station?

A. Yes.

X Q. 77. What was your work in the station?

A. Looking after circuits and see people had light.

X Q. 78. Where was the station located?

A. In Bradford.

[fol. 138] X Q. 85. As the linemen were working on the poles and were up putting up cross arms, if they wanted anything in the way of equipment, you as a ground man set it up to them?

A. Yes.

X Q. 86. Did you assist Mr. Clapper some in that sort of work?

A. Yes.

X Q. 87. How long had Mr. Clapper been employed as a lineman?

A. That I don't know.

X Q. 88. How long was he there while you were there?

A. He was there practically all the time I was there.

X Q. 89. You finished in February of 1927, you said?

A. Yes.

X Q. 90. You had then been working as a ground man for a year?

A. Yes.

X Q. 91. So that you left the station sometime in February of 1926, do you think?

A. I think it was March.

X Q. 92 And for two years before that, you had been in the station?

A. Yes.

X Q. 93. And during all that period, Mr. Clapper was employed there?

A. Yes, sir.

X Q. 94. Now as you observed it, you speak of him as a lineman. What work did he do?

A. Putting on cross arms, doing what the linemen do in working in the air.

X Q. 95. Did you have occasion to get in touch with him at any time when there was trouble on the lines?

A. No.

X Q. 96. Did you have occasion to get in touch with him and let him know there was trouble on the lines from that station?

A. Yes.

X Q. 97. How many times did you have occasion to get in touch with him?

A. I couldn't say.

X Q. 98. A good many?

A. Sometimes.

X Q. 99. How would you get in touch with him?

A. Telephone.

X Q. 100. What effect did storms have upon the lines as you observed upon the station?

A. Sometimes throw a circuit, sometimes blow fuses.

X Q. 101. And when the fuses were burned, were blowed, did you then have to get in touch with a lineman?

[fol. 139] A. Yes. People would call up; they didn't have any lights; then got in touch with some of them.

X Q. 102. Did you work days or nights?

A. I worked nights.

X Q. 103. Did you have occasion nights to call linemen in order to see that the lights were restored by putting in fuses?

A. Sometimes around six o'clock.

X Q. 104. Take it during the night when storms came and fuses were burned out?

A. I never saw them at night. I didn't call them at night.

X Q. 105. When a fuse burned out someone had to replace them when they burned out.

A. Yes.

X Q. 106. Would it indicate itself in your station always?

A. Sometimes it would and sometimes not.

X Q. 107. A portion of the line might be out of order without it being indicated in your station?

A. Yes.

X Q. 108. Did you have occasion to work along upon this line as they were putting in what you call this third wire down to this substation?

A. Yes.

X Q. 109. How close to the substation were you working?

A. I ran the wire up by that's all. They took it to the top and I went along.

X Q. 110. Who was working at the substation at that time?

A. I couldn't say.

X Q. 111. How many days were you running that wire, you remember?

A. No.

X Q. 112. Were there other ground men besides you?

A. Yes; there was another ground man besides me.

X Q. 113. Who was it?

A. Wakefield.

X Q. 114. Was Mr. Clapper working on the poles on that line as you ran it?

A. Yes.

X Q. 115. Was he working at the substation?

A. I don't know.

X Q. 116. Remember any of the men working there at that time?

A. No, sir, because I wasn't there at the substation. I was just by it, and that is all.

X Q. 117. You didn't run the wire to the substation?

A. I ran it by the substation. I didn't work at the substation.

[fols. 140-200] Redirect examination.

By Mr. Upton:

R. D. Q. 120. You ran this additional wire to this substation and by it or the man did with whom you were working?

A. Yes.

R. D. Q. 121. But the connections were not made while you were there?

A. No, sir.

R. D. Q. 122. I understand that from Newbury to Pik you were putting in a third wire?

A. Yes.

R. D. Q. 123. While working on the new wire, on the old construction were the wires that were there charged with electricity?

A. No, sir.

R. D. Q. 124. How was the current disconnected?

A. Keith had the wires killed.

R. D. Q. 125. While you were working on poles which had wires the wires were free from current?

A. Yes.

[fols. 201 & 202] JENNIE M. CLAPPER, duly sworn, testifies as follows:

Direct examination.

By Mr. Upton:

Q. 1. What is your full name?

A. Jennie M. Clapper.

Q. 2. You live where?

A. At present, I am in St. Johnsbury, Vermont.

Q. 3. You are the plaintiff in this suit?

A. Yes, sir.

Q. 4. You brought this suit in your capacity as administrator of Leon J. Clapper's estate?

A. Yes.

Q. 5. You were appointed administratrix by the Probate Court for Grafton County?

A. Yes, sir.

Q. 6. Now have you been a resident of New Hampshire?

A. Yes, sir.

Q. 7. And how long did you reside here?

A. From January, 1925, until the latter part of March, first of April, 1928.

Q. 8. Where did you live in New Hampshire?

A. Manchester, New Hampshire.

Q. 9. Leon J. Clapper was your brother?

A. Yes, sir.

Q. 10. What was his health?

A. Very good.

Q. 11. And his habits?

A. Very good.

Q. 12. Could you give us some idea of his height and general appearance?

A. He wasn't quite as tall is I, three or four inches shorter and quite stout the last few years anyway.

Q. 13. What was his weight?

A. I couldn't say. It varied the last few years because he put on weight, I should imagine 140, 145.

Cross-examination.

By Mr. Hughes:

X Q. 14. When living in New Hampshire you lived where?

A. Manchester, New Hampshire.

[fol. 203] X Q. 28. Then you and your brother Myron are the beneficiaries of this suit?

A. Yes.

Redirect examination.

By Mr. Upton:

R. D. Q. 29. During the time that you resided in Manchester were you a citizen of the State of New Hampshire?

A. Yes, sir.

R. D. Q. 30. That is, you had no other residence?

A. No.

R. D. Q. 31. Manchester was your legal residence?

A. Yes.

R. D. Q. 32. You have said you were appointed administratrix. Is this the letter of administration which was issued to you by the Probate Court of Grafton County?

A. Yes, it is.

Mr. Upton: We offer the appointment.

(Marked Plaintiff's Exhibit No. 10.)

Mr. Upton: We understand that the defendant is a Vermont corporation and a citizen of Vermont?

Mr. Hughes: Yes.

Plaintiff rests.

Mr. Hughes: The defendant offers to prove that the Bradford Electric Light Company, Incorporated, prior to the thirtieth day of July, 1926, had accepted the provisions of the workmen's compensation act in the State of New Hampshire, and that said acceptance was in force on the thirtieth day of July, 1926.

Mr. Upton: We admit the facts to be as stated in the offer.

DEFENDANT'S EVIDENCE

STEPHEN W. KEITH, duly sworn, testifies as follows:

Direct examination.

By Mr. Burns:

Q. 1. What is your full name?

A. Stephen W. Keith.

[fol. 204] Q. 2. Where do you reside?

A. Bradford, Vermont.

Q. 3. By whom are you employed?

A. The Bradford Electric Light Company.

Q. 4. Is it a Vermont corporation?

A. It is.

Q. 5. Where is its principal place of business?

A. Bradford, Vermont.

Q. 6. And it is a resident and citizen of the State of Vermont?

A. It is.

Q. 8. Will you tell the jury what your connection now is with the Bradford Electric Light Company?

A. I am local manager of the company now.

Q. 9. And have been for how long?

A. Since the early part of 1926.

[fol. 205] Q. 22. Did you know Leon J. Clapper in his lifetime?

A. I did.

Q. 23. How long had you known him prior to his death?

A. Mr. Clapper and I were born in the same town; although not in the same class with him in school I had always known him.

[fol. 206] Q. 26. Did he become connected with the Bradford Company before or after you did?

A. I think about the same time.

Q. 27. Now while you were first connected with the Bradford Company, was Mr. Leonard Drew in charge at that time?

A. He was.

Q. 28. You say Mr. Leon Clapper was also employed by the Bradford Company?

A. Yes.

Q. 29. Did you and Mr. Clapper have occasion to work together?

A. Yes. During the time that we were there together, we did.

Q. 30. Doing what kind of work?

A. Mr. Clapper and I at one time completed some services on the line which had been constructed but the house service had not been made yet. This is prior to Mr. Drew's going away.

Q. 31. That is what we want?

A. Yes, I recall that.

Q. 32. Now when you first went to work with the Bradford Company, what transmission lines did they have in operation?

A. When I first went to work for them, the highest voltage used was 6,600 volts which extended from Bradford north to Newbury and south to Fairlee.

Q. 33. Now was that single or three phase?

A. That was single phase.

Q. 34. Was that line later changed?

A. Yes. All the transmission lines were changed. The line to Newbury was done away with and relocated, the voltage raised and extended along to Wells River and Woodsville. The line south to Fairlee was changed from single phase to a three phase line.

Q. 35. Will you give the jury in your own way the history of the construction of those different lines?

A. The occasion of my going to Bradford was to lay out a new line from Bradford to Woodsville, New Hampshire, the voltage to be 13,200 volts and branch lines to Haverhill, and this was done. This displaced the line to Newbury. [fol. 207] That was the old 6,600 volt line. Newbury, Vermont, fed from 13,000 the same as Haverhill. That was again changed under Mr. Drew, and when they built a transmission line from Wilder, Vermont, to Bethlehem, New Hampshire, they utilized the top of this existing line from

Bradford to Woodsville for their 33,000 volt wires and lowered down a matter of some four feet the 13,000 volt wires and made these feed instead of from Bradford from Newbury.

Q. 36. Did any of those changes take place while Mr. Clapper was employed by the Bradford Company?

A. All that I have mentioned, I am sure.

Q. 37. To your knowledge did he work in the construction of those different lines?

A. I can't give any definite knowledge as to the 13,000 volt line, I mean the 6,600. But later was the work of changing the 33,000 volt down to 13,000.

Q. 38. What was the time the 33,000 volt line was constructed and put in operation?

A. Summer of 1925.

Q. 39. So that in the Summer of 1925, you had a 33,000 volt line from Wilder to Bethlehem?

A. That is true.

Q. 40. Starting at Wilder, what is the geographical location of Wilder with reference to Bradford, is that north or south?

A. Wilder is over near White River Junction, Vermont south of Bradford, a matter of twenty-four miles.

Q. 41. Will you give the jury the different towns through which this 33,000 volt line ran?

A. It starts in at Hartford, Vermont, Norwich, Thetford, Fairlee, Bradford Newbury, and you cross into New Hampshire, the towns of Haverhill, Bath, Lisbon, Littleton and Bethlehem.

Q. 42. Now are there any towns between Bradford and South Newbury?

A. No. No towns. Newbury is the next town north of Bradford. There are no villages to speak of, scattered farming districts.

Q. 43. Now when was this line first constructed to Haverhill, New Hampshire?

A. This was constructed the first year I was there. As [fol. 208] I say, it is either 1923 or early 1924.

Q. 44. What was the type or construction of that line?

A. There was a three phase line coming from Bradford to Woodsville. From Haverhill at that time it was single phase.

Q. 45. What was the voltage from Newbury to Haverhill?

A. 13,200.

Q. 46. Was that single or three phase?

A. From Newbury to South Newbury, three phase, to Haverhill single phase.

Q. 47. There were two wires running from South Newbury to Haverhill, New Hampshire?

A. That is true.

Q. 48. There were two wires running from South Newbury to Haverhill, New Hampshire?

A. That is true.

Q. 49. Explain to the jury the difference between a single and three phase system.

A. The single phase system consists of two wires and the three phase system consists of three wires, and the advantage is that by adding one-third again as much copper, in other words, adding one-third wire you can draw the equivalent of six wires; that is, three single circuits by grouping the wires.

Q. 50. Now the first line that you referred to running from South Newbury to Haverhill was a single phase system carrying 13,000 volts?

A. It was.

Q. 51. Was there a substation constructed at Haverhill?

A. There was.

Q. 52. How was that constructed?

A. At Haverhill, we had a couple steel poles, transformers, disconnecting switches. This lowered the voltage from 13,000 to 2,300 volts.

Q. 53. What territory was served by the secondaries, the 2,300 volts running out of the Haverhill substation?

A. The town of Haverhill.

Q. 54 During the time you worked for the Bradford Company and Mr. Clapper was also in their employ, to your [fol. 209] knowledge did he do any trouble shooting?

A. Yes, he did.

Q. 55. What are the duties of a trouble shooter?

A. The simple explanation is to fix trouble, primarily to locate it, and if possible fix it.

Q. 56. Does that involve work on all the different systems owned and operated by the Bradford Company?

A. It surely does.

Q. 57. Would that include work of changing to three phase systems?

A. Yes.

Q. 58. How many three phase systems did the Bradford Electric Company have in operation in 1925?

A. From Bradford, Vermont, to North Thetford, Vermont, a matter of twelve miles, three phase line, 6,600 volts; three phase line from Fairlee road to the town of Piermont, New Hampshire, a matter of two miles perhaps, besides these other transmission lines that I have mentioned.

Q. 61. Bradford is on the Vermont side of the Connecticut River?

A. It is.

Q. 62. What course is it necessary to take in order to go from Bradford over to Haverhill?

A. You mean the best course?

Q. 63. Yes, the best course?

A. It is to go from Bradford north along the state highway until you come to South Newbury. From there you leave the main road and cross the Connecticut River and come along the road which might well occupy this position. [fol. 210] That brings you onto the state highway here, I believe Dartmouth College; then by bearing south a bit you come to Mr. Barber's house.

Q. 64. What is the distance from Bradford to South Newbury?

A. Why, perhaps better than three miles and a half.

Q 65. From South Newbury across the Connecticut River, is how far?

A. Just across the Connecticut River would not be very far. You mean to Haverhill?

Q. 66. Yes.

A. The town lines three quarters of a mile from the river, so from South Newbury to this highway would be a little more than three quarters of a mile; it would be very near a mile.

Q. 67. Then from a point where you strike the Dartmouth College Highway in the town of Haverhill, how far would it be from the substation at Haverhill?

A. I think about a quarter of a mile up this road. This is a hill here. I judge a quarter of a mile.

Q. 68. On which side of the Dartmouth College Highway is your substation located?

A. On the west.

Q. 69. The substation is between the Dartmouth College Highway and the Connecticut River?

A. That is true.

Q. 70. Now you have located South Newbury. Where is Newbury located with reference to South Newbury?

A. It is directly north of South Newbury.

Q. 71. That is, in going from Bradford to Newbury you would first pass through the town of South Newbury?

A. Yes, so called.

Q. 72. Then if you continue along in a northerly direction, instead of going in an easterly direction across the Connecticut River, you would come to the town of Newbury?

A. You would.

Q. 73. What is the distance from South Newbury to Newbury?

A. Newbury Street stretches over a considerable area.

Q. 74. Referring to the substation at Newbury?

A. 2.7 miles, as I recall it.

[fol. 211] Q. 75. You had a substation at Newbury which controlled this line going to Haverhill?

A. We did.

Q. 76. What was the type of construction that you had there controlling the Haverhill line?

A. The Haverhill line was controlled by three switches, Newbury substation.

Q. 77. By operating these switches at Newbury, could the line from Newbury through South Newbury to Haverhill be killed?

A. Yes. This transmission line could be killed.

Q. 78. At sometime was a contract negotiated with the Lake Tarleton Club in the year 1926?

A. There was.

Q. 79. Do you remember in substance the terms of that contract?

A. Yes. The contract called for electricity at a usable voltage, limited the demand they might ask for and asked us to have it there a certain date.

Q. 80. Have you in mind the date?

A. July first, sir.

Q. 81. What service was required to meet the terms of this contract, single or three phase?

A. Three phase service.

Q. 82. Did you have a three phase service extending to Lake Tarleton at that time?

A. No, sir.

Q. 83. Now in order to comply with the terms of this contract, was any change necessary in your construction?

A. There was.

Q. 84. What change was necessary?

A. Well, from the point at South Newbury, it was necessary to extend the third phase in the 13,000 volt line to the substation at Haverhill. It is necessary to add another transformer at Haverhill and to extend from Haverhill one more wire to the schoolhouse in Pike, New Hampshire. It should be out here somewhere.

Q. 85. In an easterly direction from Haverhill?

A. Yes, from there to Lake Tarleton Club, three and one-half miles, it was necessary to construct a new three phase line.

Q. 86. As we understand it, at the time this contract was entered into you had existing a three phase system running from Newbury to South Newbury, is that right?

A. That is true.

[fol. 212] Q. 87. Two of those primary wires extended over to Haverhill?

A. That is right.

Q. 88. But the other primary wire stopped at South Newbury?

A. That is true.

Q. 89. Any use made of that three phase system between Newbury and South Newbury?

A. No, there was not.

Q. 90. In the reconstruction of this line it then became necessary for you to continue the third phase, or the third wire, from South Newbury to Haverhill, is that right?

A. That is right.

Q. 91. Now have you in mind the date when you first started this new construction?

A. Sometime the first of June, 1926, I think.

Q. 92. Was Leon Clapper employed by the Bradford Company at that time?

A. He was.

Q. 93. Did he have anything to do with reference to the construction of this new line?

A. He did.

Q. 94. What part did he take in the work?

A. Mr. Clapper was a lineman and myself, he and myself and other linemen strung the wire and done what work was necessary there.

Q. 95. What work was necessary in order to change that single phase to a three-phase system and run the line through to Lake Tarleton?

A. It was necessary to add new pins and insulators to all the poles from South Newbury to Haverhill. It was necessary to add new insulators. The pins were all there from Haverhill to Pike. From Pike to Lake Tarleton, it was necessary to set new poles, put on new cross arms, trim out the line and string the wire.

Q. 96. You say a third wire was run. Where was this third wire run with reference to the two wires already in operation?

A. The middle.

Q. 97. Was that third wire run from South Newbury to Haverhill with the voltage on, that is, the current flowing?

A. You mean in the other two wires?

Q. 98. Yes.

A. No.

[fol. 213] Q. 99. How was the current killed in the other two wires while this construction was going on?

A. Killed at Newbury substation.

Q. 100. After the third wire was run from South Newbury to Haverhill, was a third wire extended east beyond the Haverhill substation?

A. It was.

Q. 101. Was it necessary to install a separate fuse box for that one?

A. I considered it so.

Q. 102. Now when with reference to the time of starting and finishing the job was the Haverhill substation wired?

A. That would be one of the last things we did, sir.

Q. 103. Now before you get to the point of wiring you said it was necessary to install an additional transformer?

A. It was.

Q. 104. Was that transformer installed as the work progressed?

A. I don't recall that. That was a heavier job. We tried to group our work; in other words, after the transformer was hung, there would be a matter of five or six men you would not need in the wiring of it. It took the whole crew to hang the transformer.

Q. 105. The point is whether or not the additional transformer was hung up before you came to the wiring?

A. Yes, it was.

Q. 106. So that when you came down to the time of the wiring, everything was in readiness for the wiring to take place?

A. That is true.

Q. 107. During the construction of that line, you say Mr. Clapper assisted?

A. He did.

[fol. 214] Q. 114. Was Mr. Clapper familiar with the construction which was to take place on this line?

A. I think he was.

Q. 115. Did you talk over with Mr. Clapper the different phases of the construction of this line and what was to be done?

A. I talked over with Mr. Clapper and all the linemen what we were doing.

Q. 119. After the third wire was run through from South Newbury to Haverhill and the secondaries extended [fol. 215] on, there came a time when it was necessary to wire up this Haverhill station, is that right?

A. That is true.

Q. 120. Who did the actual wiring on this Haverhill station?

A. Mr. Clapper and myself.

Q. 121. What work was it necessary for you and Mr. Clapper to do in order to change that Haverhill station from a single to a three phase system?

A. It was necessary to alter the wiring in such a way as to incorporate the other transformer.

Q. 125. Now before the changes took place, what means were provided for killing the station at Haverhill other than the switch at Newbury that you have referred to?

A. There was a switch on the pole lettered one, disconnected incoming circuit.

Q. 126. You refer to the two primaries?

A. I do.

Q. 127. How was that switch operated?

A. Operated from the ground by a switch handle which worked up and down, the action of the blades here depending upon the action of the switch handle.

[fol. 216] Q. 128. What was the effect upon the blades when the switch handle was operated?

A. These particular blades swung on a horizontal plane, and as I recall it there were two rotating standards here with bearings on them, and at the top of each one at right angles was a copper blade, swung out a matter of fifteen inches or so. In the closed position they laid in plain cross arm in an open position. They laid in a plane with two lines.

Q. 129. After this third wire was run in and during the construction of this line from a single phase, did you have any discussion with Mr. Clapper with reference to the operation of that switch at the Haverhill station and what the effect of operating that switch would be after this third line was run in?

A. At the time we wired the substation over, I pointed out to Mr. Clapper—we discussed it, that the operation of that lever would not render the substation safe to work upon.

Q. 130. Why was that?

A. Because the switch as it stood there did not sever the third wire. There was still a wire running in.

Q. 131. In consequence of that, did you issue any orders with reference to the operation of that switch and the use to be made of that switch at Haverhill to any group of men in which Mr. Clapper was included?

Mr. Upton: I object.

The Witness: I did. I told every member of the crew.

Mr. Upton: I object to this.

The Court: Do you include Mr. Clapper?

(Question and answer read.)

Mr. Upton: It seems to me the answer goes beyond the question.

The Court: I think it may stand.

Q. 132. Will you complete that answer if you have not done so?

A. I have nothing more to add to that.

Q. 133. What I want to get at, will you tell the jury just what instructions you gave your men, including Mr. Clapper, with reference to the use and operation of that switch at Haverhill after the system was changed from a single to a three phase system?

[fols. 217-220]

Mr. Upton: I object.

This question is broad enough to cover instructions whether given in Mr. Clapper's presence or in his absence.

The Court: Limit your question to the time when Clapper was present.

Mr. Burns: That is what I expected him to answer. My position is that instructions might have been given to other men when Clapper was present.

The Court: I appreciate the situation. Go ahead.

Q. 134. Do you understand the question?

A. I think so. I instructed Mr. Clapper personally at the time the substation was constructed.

Q. 135. Tell the jury what instructions you gave him?

A. As I have said, I commented to Mr. Clapper that throwing the disconnect switch at the Haverhill substation did not render the substation safe to work upon.

Q. 136. What method was provided for killing the Haverhill station after the system was changed over?

A. The method has already been provided at the Newbury substation.

[fol. 221]

Q. 178. You said that Mr. Clapper was employed sometime as a trouble shooter?

A. That is true.

Q. 179. How were complaints of trouble communicated to Mr. Clapper to your knowledge?

A. All troubles of course are reported directly to either the office or station in the daytime, and after office hours at the station, sometimes directly to my home, and at that time it is the custom to communicate with whoever was there the trouble, whoever was on duty for trouble.

Q. 180. These complaints come in to the station operator at Bradford?

A. He would.

Q. 181. How would he know where the trouble shooter was, if he wanted to get in touch with him?

A. I usually was informed as to where he was.

Q. 182. During the time Mr. Clapper was employed as a trouble shooter, did he remain right at the Bradford Station just to take care of trouble complaints or did he work out on the line with the rest of the men?

[fol. 222] A. I don't think anybody ever stayed right at the station for trouble complaints. Sometimes a man who is a recognized trouble shooter was allowed to come in early in the afternoon to find out if he had anything to do, but there was usually enough to do for him in the matter of street lights, new services and such.

Q. 183. Mr. Clapper was the man that looked after that kind of work?

A. He did that work with others.

Q. 184. Take the complaints that came in during the night, what method would the station operator have of communicating that to the trouble shooter?

A. He would have to know where he could get him, call him up; that was the usual procedure.

Q. 185. How would he get in touch with the trouble shooter?

A. By telephone, usually.

[fol. 223] Q. 199. Now on the night of July 30, 1926, at the time Mr. Clapper met his death, were you in Bradford on that evening?

A. I was not, sir.

Q. 200. Where were you?

A. I was in Newport, Vermont.

Q. 201. When did you go to New[illegible]?

A. Directly after five o'clock I started out.

Q. 202. Who was your station operator at that time?

A. Mr. Carman, I think.

Q. 203. When did you first learn of Mr. Clapper's death?

A. Oh, later that night, sir.

[fol. 224] Q. 205 Had any changes been made in the construction and operation of the Haverhill station from the time it was put in operation on the third of July up to the time Mr. Clapper met his death on July 30, 1926?

A. There had not.

Q. 209. How many men in 1926 were employed by the Bradford Company?

A. I believe eleven.

Q. 210. And among those I presume you had some linemen?

A. We did.

Q. 213. What was done with reference to this switch on the Haverhill station after this third wire was run in?

A. Nothing that I know of.

Q. 214. How was it fastened to the station, locked or otherwise?

A. Always locked; it was locked.

Q. 215. Who had the key to those locks?

A. The locks of the company are all similar. One key fits them all; every lineman had a key.

Q. 216. Including Mr. Clapper?

A. He did.

Q. 217. So it was only the linemen employed by the company that would have access to that switch through the keys which they held?

A. That is right.

[fols. 225-227] Cross-examination.

By Mr. Upton:

X Q. 218. You have seen the photographs, Plaintiff's Exhibit- 1 to 6 which have been introduced here?

A. If they are the same as at the other trial, I have, sir.

[fol. 228] X Q. 264. In doing the work at the Haverhill substation, where was the current cut off?

A. I think at Haverhill that work was done first.

X Q. 265. Then you used in constructig this line, you used the Haverhill substation to cut off the current?

A. I think we did.

X Q. 266. And you didn't go to Newbury at all times for the purpose of killing the lines?

A. Not at that time.

X Q. 267. You went to the nearest point?

A. Yes.

X Q. 268. This wire, of course, was done before that three phase system was tied into the transformer of the substation at Haverhill?

A. Yes, sir, it was.

X Q. 269. The last work you did there was to connect up the three phase system?

A. Yes.

X Q. 270. That was done on July 3?

A. I don't think I have stated that date. It was the latter part of the job.

X Q. 271. Wasn't it done on the very day that you completed your system, so that you could supply current to the Lake Tarleton Club?

A. I can't say.

X Q. 272. Haven't you said this work was done on July 3?

A. It was done the latter part of the job. It might have been done the last day.

X Q. 273. And the fact is you contracted to get service July first, but didn't get the system so as to function until July 3, the day before the fourth?

A. That is true.

[fol. 229] X Q. 274. It was necessary for you to have it in there July 4?

A. We were attempting to have it in the first of July.

X Q. 275. It was rather necessary for you to have it in there July 4. That was the date when people would demand service there?

A. I don't know whether that had any significance or not.

X Q. 278. There had been a switch which was expected to cut off the current?

A. As long as that station had been there, yes.

X Q. 279. And that condition continued up to the time that you tied in the three phase system?

A. That is right.

X Q. 280. Then you had no effective station?

A. In order to kill it we had to go to Newbury. No switch at the Haverhill substation.

X Q. 281. But you left what appeared to be a switch?

A. We left a switch.

X Q. 282. You left what appeared to be a disconnecting switch?

A. We left a switch there.

X Q. 283. Did you intend to leave that station in that condition permanently?

A. I had no plans for changing it.

X Q. 284. Then you intended to leave it that way for all time?

A. So far as I knew then, I did, yes, sir.

X Q. 285. On the last of June or the first of July, when you were completing this job, did you have at hand the material necessary for a proper switch at this station?

A. I can't say whether we did or not. I don't know.

X Q. 286. How long would it have taken to have installed a proper switch at this station, a switch which would have enabled the person operating it to have killed the station, assuming you had the material at hand?

A. I can't say as to that. I don't recall offhand. I presume it could have been done in a day.

[fol. 230] X Q. 298. Now you say that in completing this substation at Haverhill you caused a fuse box to be put into the third secondary.

A. I did.

X Q. 299. So that all your secondaries leading out of this station were equipped with fuses?

A. That is true.

X Q. 300. What for?

A. Well, they serve to keep the line from being overloaded or the transformers being overloaded. They limit the amount of current that can pass through the substation.

[fol. 231] X Q. 301. Do they serve as protection in any way?

A. Yes.

X Q. 302. Won't you explain?

A. I have, sir, in saying they limit the amount of current that can go through the substation.

X Q. 303. You mean if your line or secondaries become overloaded and the current flow back toward your transformers, the fuses would blow or burn out?

A. I do.

X Q. 304. So that your transformers would not be injured?

A. That is true.

X Q. 305. That is one of the purposes of seeing that your secondaries were equipped with fuses?

A. Yes.

X Q. 306. Was there any other purpose?

A. I think that is the purpose of fuses.

X Q. 307. You also sought to prevent an overload passing out on the secondaries, causing damage?

A. Well, the source of the load would be on the Haverhill side.

X Q. 308. Why?

A. It is the way of it. It is where the load occurs on the so called load side of the transformer on the secondary wires.

X Q. 309. If you got lightning into the transformer station, would that be likely to be a cause which these fuses might eliminate so far as your secondaries beyond the station are concerned?

A. I think that other system would have taken care of that out of the Newbury substation. The load would have to occur on the Haverhill side of those plugs to blow.

X Q. 310. It would make no difference if a stroke of lightning came into this substation?

A. A direct stroke might do anything.

X Q. 311. You took care to put in these fuses. Was it really your intention to leave this station permanently without a switch, a switch which would make it safe for employees to work there?

A. I had no other plans in connection with the station at that time.

X Q. 312. Haven't you said that that was a temporary condition?

A. I may have said so.

X Q. 313. You did say so at the former trial?

A. I believe I did, yes. I didn't have any time to qualify it.

[fol. 232] X Q. 314. Were you asked this question and did you make this answer: "Q. I am trying to find out what your purpose was. Was it your purpose to get along"—"A. Temporary." Were you asked that question and did you make that answer?

A. Apparently so.

X Q. 315. Is it true?

A. I had no plans; that is, the word temporary means I had no plans for changing it at that time.

X Q. 316. I was interrupted: "Q. I am trying to find out what your purpose was. Was it your purpose to get along without a switch either temporary or permanent?" The answer to that is "Temporary." That is the way you answered that question when it was put to you?

A. Apparently so, yes.

X Q. 317. And that answer was true, you did intend to get along without a switch there only temporarily?

A. In that I had no other plans.

X Q. 318. Was that answer correct?

A. In that as I have said it was.

X Q. 319. Were you asked this question at the former trial, and did you make this answer: "Sometime you expect to put that switch in proper shape? A. Possibly."

A. I believe that was said; apparently, it was.

X Q. 320. Then you did at sometime expect to put that switch in proper shape?

A. I had no plans.

X Q. 321. Are you not hiding behind a play on words?

A. I had no plans at that time for any reconstruction on that substation.

X Q. 322. You had no present plans, but you didn't intend to leave that station indefinitely without a switch which would kill the station?

A. I had no plans in connection with a new switch on there.

X Q. 323. Now you left the switch lever there?

A. Yes, sir.

X Q. 324. And you left a padlock there which any man could operate, that is, every man had a key?

A. Every man in the company had one.

[fol. 233] X Q. 325. You didn't take any steps to remove the rock or cable to the lever or any part or so much of the switch as was there?

A. No, sir.

X Q. 326. Yet you say you had no present plans of replacement to put it in order?

A. That is true.

X Q. 327. It wasn't a proper switch that you left there?

A. Proper for what it was designed for.

X Q. 328. What was it designed for?

A. Designed for a two wire switch, designed for a single circuit.

X Q. 329. It wasn't a proper switch at that place?

A. Not for three phase, a proper switch.

X Q. 338. What is the length of the line between Newbury and Haverhill station?

A. Oh, four miles, four miles and a half.

X Q. 339. Now how many different men were engaged in the construction of this line to supply Lake Tarleton?

A. There were quite a few men, sir. Our crew numbered eleven, and taking out the three station men and a meter man, that left about seven men.

[fol. 234] X Q. 340. You had seven men in your own crew?

A. Yes, and we had for a short space of time three additional men.

X Q. 341. When did you have those three additional men?

A. That was in the erection of the line from the Pike schoolhouse to Lake Tarleton.

X Q. 342. And when?

A. During June.

X Q. 343. Did that finish up the work?

A. That happened to be the first part of the work.

X Q. 344. How long did those men remain there and when did they get through?

A. I can't tell you; sometime in June they came and went.

X Q. 345. You say that you and Mr. Clapper wired in this substation?

A. Yes, sir.

X Q. 354. Where were the other men that day, where were they working?

A. I believe they were trimming trees in preparation for putting a line in circuit.

[fols. 235 & 236] X Q. 355. How many men were engaged in trimming trees?

A. I don't know.

X Q. 356. Where were they trimming trees?

A. On the Lake Tarleton line.

X Q. 363. Then you did tie in this station there the second or third of July?

A. I have so stated.

X Q. 364. As a final step to supplying current to Lake Tarleton?

A. That is right.

[fol. 237] X Q. 386. Didn't you tell Mr. Clapper in substance that throwing this switch would not clear this station, that there would still be current in the third wire, wasn't that just what you told him?

A. No, that wasn't just what I told him.

XQ. 387. Wasn't that the substance of what you told him?

A. What I told him was that the substation would not be safe to work upon.

XQ. 388. Is that all you told him?

A. That among other things.

XQ. 389. At the first trial, were you asked these questions, and did you make these answers:

"Q. Do you know if Mr. Clapper knew how this switch operated at the Haverhill substation after the third wire was run?

"A. I previously testified that I told him.

"Q. Told him what?

"A. I told him the third wire was alive and opening the two switches did not kill the substation, and opening those two switches did not kill the substation."

That is what you told him, wasn't it?

A. That among other things.

[fol. 238] XQ. 394. What kind of a switch would enable Mr. Clapper the night he went there to kill that station?

A. A switch which killed all sorts of power to the substation.

XQ. 395. What kind of a switch could you have had there or installed there which would enable Mr. Clapper when he went there to clear that station of electricity?

A. There might be such a switch as would have broken three wires on that substation.

XQ. 396. You mean that you didn't know such a switch in your practice at the time of this accident?

A. Not applicable to that occasion.

XQ. 397. Never seen one?

A. No, not with such a hook up.

XQ. 398. How would a switch necessary to kill that station differ from switches with which you are familiar?

A. It would be three blades. I am assuming you want it with the others at the top of the pole.

XQ. 399. Where it ought to be at that station to kill it, to make it free of current?

A. We had no three blade switch on top of the pole for breaking three wires at the time.

[fol. 239] X Q. 400. Are you not familiar with the appliances such as switches in common use on the trade back there in 1926?

A. Yes, indeed.

X Q. 401. And didn't you know that a switch could be entertained through which you could disconnect each one of these three primary wires from the station and render it free of current of electricity?

A. Yes. We had such a switch at Newbury, and I think it could have been installed there.

X Q. 404. You say you talked with Mr. Clapper about that switch in the station. Did you tell him you were going—how long you were going to leave it with that kind of a switch you had there?

A. No, because I didn't know myself.

X Q. 405. And a switch which would have disconnected these three primary wires from this station if thrown or open would have made the station safe to work upon?

A. With all current, with all wires broken, I think the station would have been safe to work upon.

X Q. 406. And that was the assumption of my question if you had a switch which would break all three primary wires?

A. Yes.

X Q. 407. By opening it or disconnecting the primary wires you could make that station safe to work on?

A. Safe to work on, yes.

[fols. 240-242] Redirect examination:

[fol. 243] R. D. Q. 420. What use, if any, was to be made of the switch at the Haverhill substation after the changes were completed?

The Court: You may answer what use is to be made of it.

R. D. Q. 421. (Question read)?

A. Intended for no use.

R. D. Q. 422. Now Mr. Upton referred to this station being rendered safe if a switch was installed which would cut off all three primaries going into the Haverhill station, whether such a switch installed could be operated at the Newbury station?

A. It was.

R. D. Q. 423. So that by operating a switch at the Newbury station, the Haverhill station could be rendered safe to work upon?

A. It could.

[fol. 244] R. D. Q. 425 Was the switch that was in operation for the single phase system intended by you to be used in any connection with three phase?

A. It was not.

R. D. Q. 426. Was it your intention to discard the switch after these changes were made?

A. I had no intention to disconnect them.

R. D. Q. 427. Did you intend to use it in connection with the Haverhill station?

A. No, I did not.

[fol. 245] Roy A. Carman, duly sworn, testifies as follows:

Direct examination.

By Mr. Burns:

Q. 1. What is your full name?

A. Roy A. Carman.

Q. 2. Where do you live?

A. Bradford, Vermont.

Q. 3. Your occupation?

A. Station operator.

Q. 4. Employed by whom?

A. Bradford Electric Light Company.

Q. 5. How long have you been in the employ of the Bradford Electric Light Company?

A. A little over four years.

Q. 6. In what capacity?

A. Station operator.

Q. 7. During all of that time?

A. Yes.

Q. 8. Did you know Leon J. Clapper in his life time?

A. I had met him, while he worked for the company there.

Q. 9. When did you first become acquainted with him prior to his death?

A. The summer of 1925, when I first went to work for him.

Q. 10. During that time, what was he doing, if you remember?

A. He was a lineman.

Q. 11. What were your duties as station operator?

A. To see that things ran smoothly in the plant.

Q. 12. Where were you located?

A. At Bradford.

Q. 13. Were there other power stations in connection with the Bradford plant other than the plant with which you were connected?

A. Yes.

Q. 14. Where were they?

A. Woodsville, Lisbon, Littleton, and Wilder.

Q. 15. What lines, if any, were controlled by the Bradford station?

A. We had their local circuits, Fairlee and points south and Bradford and a power circuit before that time.

[fol. 246] Q. 18. Who were the other station operators?

A. There was Clarence Moore and Jesse Gilbert.

Q. 19. What were your hours of employment in 1926?

A. 5 p. m. to 1 a. m.

Q. 20. And what were the hours of the other station operators?

A. Mr. Moore relieved me at one o'clock until nine. Mr. Gilbert, nine to five.

Q. 21. During the time you were connected with the Bradford Company, did Leon Clapper ever act as trouble shooter to your knowledge?

A. Yes, sir.

Q. 22. How did you happen to know that?

A. He told me so.

Q. 23. As trouble shooter would you have occasion to get in touch with him from time to time?

A. Yes.

Q. 24. What would the trouble consist of?

A. A call would come in from a customer who did not have lights, reporting his lights out or the whole town out. In that case I would get in touch with Keith or Clapper according to what orders were left with me and they would see to the trouble.

Q. 25. Did you at any time work during the day?

A. We occasionally swapped runs for the convenience of the other operator.

Q. 26. Was Leon Clapper a trouble shooter during the day?

A. Yes.

Q. 27. How would you know where to communicate with Clapper?

A. It was customary to leave word with the operator on duty where to find him or Mr. Keith in case of a trouble call.

Q. 28. In case a trouble call came in during the day you would know where he were working and get in touch with him?

A. Yes.

Q. 29. If a complaint came in during the night how would you communicate with Mr. Clapper, or Mr. Keith?

A. By telephone.

[fol. 247] Q. 30. Did Mr. Clapper live there in Bradford?

A. Yes, sir.

Q. 31. If there are any thunder storms in the different localities that are served by the Bradford Company, would that in any way be indicated in the station?

A. Yes, sir.

Q. 32. In what way?

A. We would know of a hit on the line by lightning by the line surging. You would hear the generators howl; you would see the lights wink.

Q. 33. Were you familiar with the fact that sometime in 1926 the line from Newbury to Haverhill was changed from a single to a three phase system?

A. Yes.

Q. 34. How was that fact brought to your attention?

A. The lineman working over there, and they told me that they were using a third wire. I saw them do it.

Q. 35. Where were the headquarters for the linemen indicated on that plan?

A. Bradford plant.

Q. 36. That is where you were stationed as a station operator?

A. Yes.

Q. 37. To your knowledge, was Leon Clapper employed in the construction of this line from Newbury to Haverhill?

A. Yes.

Q. 38. How do you know that?

A. Because I know of his working there with the boys.

Q. 39. How was that brought directly to your attention?

A. By word being left with me where to find him if I wanted him for a trouble call.

[fol. 248] Q. 44. Now calling your attention directly to the evening of July 30, 1926, were you on duty at that time?

A. Yes, sir.

Q. 45. In your capacity of station operator?

A. Yes.

Q. 46. At the Bradford plant?

A. Yes.

Q. 49. On the evening of July 30, was your attention at any time called to the fact that the lights in the town of Haverhill were out?

A. By telephone.

Q. 50. Have you in mind the substance of that complaint, what time you received it?

A. I think right around seven o'clock I received a call. There were no lights in Haverhill.

Q. 51. In consequence of receiving that call, what did you do?

A. I immediately tried to locate Mr. Keith. He left town a little while before I came on duty. Mr. Gilbert, the day man, told me I would find Clapper at Mr. McClure's house.

Q. 52. Who is Mr. McClure?

A. He was the local manager at that time in Bradford.

Q. 53. And Mr. Gilbert told you you would find Mr. Clapper there?

A. Yes.

Q. 54. Did you know the occasion for Mr. Clapper being there?

A. He was engaged to Mr. McClure's daughter, and he spent most of his free time there.

Q. 55. Had you had occasion to call Mr. Clapper at Mr. McClure's house before?

A. Occasionally.

[fol. 249] Q. 56. And that was for night trouble?

A. The early evening.

Q. 57. What time did you get in touch with Mr. Clapper on this evening?

A. Why, it was soon after. I don't remember now what time it was.

Q. 58. What did you say to him as you remember it?

A. I left word that Haverhill was out; that is all that was necessary for me to say.

Q. 59. Then what took place?

A. He came to the station a little while afterwards.

Q. 60. Does the company provide any means of transportation for the trouble shooter in locating difficulties?

A. Ford truck.

Q. 61. Where is that Ford truck located with reference to where your station is operated?

A. The garage sets right there in the yard by the station.

[fol. 250] Q. 70. Did you observe him as he left the garage in the car?

A. Yes.

Q. 75. After Mr. Clapper left the garage, what was the next you heard in connection with his work?

A. Not until I received a telephone call from Haverhill, who was shrieking, "kill your line quick," says a man on the wire.

Q. 76. After receiving this call from Haverhill, what did you do?

A. I immediately told central to get in a call for the Wilder plant to take the Bradford station off the line with the circuit breaker. I had her call Jesse Gilbert to get him to come down to the plant.

Q. 77. Who was Jesse Gilbert?

A. He was the day station man.

Q. 78. Where did he live?

A. The second house from the end of the *door*.

Q. 79. He lived in the town of Bradford?

A. Mr. Gilbert, yes.

Q. 80. Gilbert came down to the station?

A. Right off.

Q. 81. Why was it necessary to put in these calls to Wilder?

A. Because we could not kill the line at Bradford by one switch. We had to telephone the Wilder plant. We had to call Lisbon plant to be sure the line was dead when we went over.

Q. 82. Is that because the line to Haverhill was a branch line?

A. Branched off at Newbury.

[fol. 251] Q. 83. The only way to kill that line was to get in touch——

A. Without going to Newbury, it is the only way we could do it without going to Newbury.

Q. 84. There was no way you could kill the line itself from the Haverhill station by any act you could do yourself from the Bradford station?

A. No, sir.

Q. 85. After you received this call and got in touch with Mr. Gilbert, did Mr. Gilbert come down to the station that evening?

A. Right off in a few minutes.

Q. 86. In the meantime, what did you do?

A. I went over and got Mr. Moore. He lived just the other side of the bridge. He was the third operator. Mr. Gilbert was there by the time we got back, and we both went over to Haverhill.

Q. 87. How did you and Mr. Gilbert come to Haverhill from Bradford?

A. We took the Reo truck.

Q. 88. Who drove on the way over?

A. Mr. Gilbert.

Q. 89. Did you come directly to the Haverhill station?

A. Yes.

Q. 90. What was the situation when you arrived there?

A. I should say there was 15 or 20 people there. I recognized Doctor Russell, the first man I met and went down to the substation. I could see him then. I could see from his hips to his feet.

Q. 91. What did you do?

A. I put the ladder up against the transformer and Jesse and a man by the name—we call him Dusty—went up two or three rounds. They passed his tools down to me and I guess Jesse got him down the ladder, supporting the body. I took his foot. The doctor lowered him to the ground, examined him and pronounced him dead.

[fols. 252 & 253] Q. 104. You say Doctor Russell was there at the scene of the accident?

A. Yes.

Q. 105. After the body was lowered to the ground, did Doctor Russell examine it?

A. Yes.

Q. 105½. And what did the doctor say?
A. He pronounced him dead.
Q. 106. What was done at the time?
A. I took the Ford truck that was left over there and went back to Bradford.

Cross-examination:

[fols. 254-263] X Q. 139. Did you notice what equipment Mr. Clapper had on when they found him?
A. He had his lineman's belt, tools, rubber gloves and skates.
X Q. 140. Were the rubber gloves on?
A. Yes.
X Q. 141. He had rubber gloves on his hands?
A. Yes.
X Q. 142. Leather gloves on over those?
A. Yes.
X Q. 143. He had rubber gloves and leather gloves on, is that right?
A. Yes.
X Q. 144. Had both on?
A. Yes, sir.
X Q. 145. Did you help take them off?
A. No. I didn't go up the pole.
X Q. 146. Were those taken off before the body was brought down?
A. Yes, sir.

[fol. 264] Jesse G. Gilbert, duly sworn, testifies as follows:

Direct examination.

By Mr. Burns:

Q. 1. What is your full name?
A. Jesse G. Gilbert.
Q. 2. Where do you reside?
A. Bradford, Vermont.
Q. 3. What is your occupation?
A. I am a lineman, line foreman.
Q. 4. Employed by whom?
A. Bradford Electric Light Company.

Q. 5. How long have you been in the employ of the Bradford Electric Light Company?

A. About seven years and a half.

Q. 6. What was your first connection with the Bradford Electric Light Company?

A. Station operator.

Q. 7. How long were you station operator?

A. A little over five years.

Q. 8. And after that what was your employment?

A. I went outside as a lineman, and last May I was put in as line foreman.

Q. 9. While you were station operator, what hours did you work?

A. I began working from noon until midnight and then from midnight to noon, and then noon to midnight, and then Mr. Drew came to Bradford and put us onto three shifts. I had nine to five.

Q. 10. That is, 9 a. m. to 5 p. m.?

A. Yes.

Q. 11. You were connected with what station, with the Bradford station right in the town of Bradford as station operator?

A. Yes.

[fols. 265-267] Q. 12. Did you know Leon J. Clapper?

A. I did.

Q. 13. How long had you known him prior to his death?

A. About two years, I think.

Q. 14. When did you first become acquainted with him?

A. When he came from Newport, Vermont.

Q. 15. He was employed by the Bradford Company from that time up to the time of his death?

A. He was.

Q. 16. In what line of work was he engaged?

A. He came as a lineman, and there was a while he was put in — trouble shooter.

Q. 17. Were you familiar with the work that he was doing?

A. Just that he was a lineman.

Q. 18. Are you familiar with the different jobs that he worked on?

A. He worked with the rest of the gang, and at one time he had charge of the gang.

Q. 19. When was that?

A. That was when they built the line from Woodsville to Lake Tarleton.

Q. 20. What type of construction was that line?

A. That was 4,400 volts single phase.

Q. 21. How many men would he have charge of during the construction of that line?

A. I couldn't say how many he had.

Q. 22. You say that at some time he did trouble shooting. How was that brought to your attention?

A. He took Leonard Drew's place when they built the big transmission line which required a man to take care of trouble. Leonard Drew started in and Mr. Clapper took his place.

Q. 23. Would complaints of trouble be brought to your attention as station operater?

A. They would.

Q. 24. After receiving those complaints, what would you do?

A. If the linemen or trouble shooter was there, we would tell them. If they wasn't, we would call Keith or Drew.

Q. 25. Who was the trouble shooter you got in touch with?

A. At the time Mr. Clapper was supposed to be trouble shooter, we tried to locate him.

[fol. 268] Q. 49. Calling your attention to the 30th day of July, 1926, were you employed by the Bradford company at that time?

A. I was.

Q. 50. In what capacity?

A. Station operator.

Q. 51. On the evening of July 30, 1926, was your attention in any way called to an accident in which Mr. Clapper was involved?

A. It was.

Q. 52. In what way?

A. I was in bed at the time the call came.

Q. 53. Let me go back: Before you learned of the accident, was your attention brought to the fact that the town of Haverhill was having trouble with the lights?

A. I was.

Q. 54. In what way?

A. Mr. Carman called me and said that the town of Haverhill was out of lights and wanted to know if I knew

where he could locate somebody. I told him that Mr. Clapper had told me he would be in town that night and I thought I could locate him at McClure's, but if he could not find them that I would go and fix the trouble.

Q. 55. When was your attention next brought to this accident?

A. I waited a while, a few minutes. Mr. Carman said [fols. 269-271] that Clapper had started for Haverhill. In a few minutes after that, I went to bed; then the telephone rang, and my wife answered it and they wanted me to come quick to the telephone. I went to the telephone and a lady screamed and says, your man is burning up over here on the wires. At the same time Mr. Carman, they must have had him connected on the line, said: "What will we do?" I said, "Trip your tie line switch and get them all off and I will be there." I got my shoes and clothes on as fast as I could and ran to the station.

Q. 56. Tell what you did after you got to the station?

A. I got the Reo truck out. By that time Mr. Carman had got the other station man to relieve him; he and I went to Haverhill.

Q. 57. What was the situation when you arrived at Haverhill?

A. There was quite a few cars and people there. All had flash lights more or less of them, and I ran right down to the substation, and one fellow says, "He is right up there," he stuck his light up and I looked and he laid on the wires. I turned and ran back to the truck and got a rope. While I was after the rope, somebody stood the ladder up against the transformer, and Christie, the fellow they called Dusty, says: "You want me to help you?" He started right up the ladder, and he went up on the transformer, and I went up after him. While he was tying the rope around his body, I took his rubber gloves, body belt and skates off and dropped them down to the fellows below.

Q. 58. Where were the rubber gloves?

A. They was on his hands.

[fols. 272-274] Q. 88. After the body was lowered to the ground, what was done?

A. When I got to the ground two or three of them lifted him off of my shoulder. Doctor Russell was there, examined him and pronounced him dead.

[fols. 275-279] Cross-examination.

By Mr. Upton:

X Q. 121. You say that on the night of Mr. Clapper's death Mr. Carman communicated with you?

A. He did.

X Q. 122. And told you that the lights were out in Haverhill?

A. Yes, sir.

X Q. 123. And you offered to go over there and do the work?

A. I did.

X Q. 124. In case Mr. Clapper could not be found?

A. Yes.

X Q. 125. You were willing to go to the Haverhill station to look after this work?

A. Yes, sir.

[fol. 280] X Q. 202. Some reference has been made to Mr. Rushford; he was a lineman employed by the Bradford Company in 1926?

A. He was.

X Q. 203. Where is he now?

A. In Bradford.

X Q. 204. Working for the company?

A. He is.

[fol. 281] X Q. 205. Some reference has been made to Mr. Richardson. Was he a lineman employed by the company in 1926?

A. He was.

X Q. 206. Where is he now?

A. I don't know where he is.

X Q. 207. When last did he work for the company?

A. He has not worked for over two years.

X Q. 208. And Mr. Richardson was working there all through 1926?

A. I could not say.

X Q. 209. He was working there at the time of this accident and before?

A. He was working right around the time of the accident.

[fols. 282-296] X Q. 216. Was Mr. Richardson employed by the company there that summer before this accident?

A. Before the accident, I know he was.

X Q. 217. Mr. Barry?
A. Yes, sir.
X Q. 218. He was employed there as a lineman?
A. He was.
X Q. 219. All these men did trouble work at times?
A. They did.
X Q. 220. Where is Mr. Barry now, if you know?
A. He was in Newport the last I knew.
X Q. 221. Newport, Vermont?
A. Yes, sir.
X Q. 222. Now you say that when Mr. Clapper was taken down he was pronounced dead?
A. He was.
X Q. 223. What examination was made of him to determine whether or not he was dead?
A. Doctor Russell
X Q. 224. What did he do?
A. He open his shirt and tested his heart.
X Q. 225. Did he open the jumper or frock?
A. He did.
X Q. 226. Opened them both?
A. He did.

[fol. 297] CHARGE TO JURY—MORRIS, J.

MR. FOREMAN AND GENTLEMEN: The case on trial before you is an action of negligence brought by Jennie M. Clapper, Administratrix of the estate of Leon J. Clapper of Bradford, Vermont, against the Bradford Electric Light Company, Incorporated, to recover for injuries and death of plaintiff's intestate.

The declaration in the writ alleges that on July 30 while in the employment of the defendant the deceased was working in the construction, alteration or repair of wires or apparatus charged with electric current, and by reason of the carelessness and negligence of the defendant the intestate was in contact with such electric current, so as to receive a shock which caused his death. The plaintiff's amended declaration further alleges that the substation at which the plaintiff's intestate was killed was not reasonably, properly or suitably equipped in that a switch or dis-

connect did not serve to cut off the electric current from the transformers and wires and that the transformers, wires and appliances were so installed as to make the place unnecessarily dangerous and unsafe and that the defendant failed to give the plaintiff proper instructions in regard to the dangers of the substation. The defendant answering the allegations in the plaintiff's writ denies them and says it is not guilty and was not guilty of negligence.

The plaintiff having made the allegations of negligence against the defendant, the law casts upon her the burden of proving it. The burden of proof is a rule which provides that the party upon whom the law casts the burden of proof upon any given issue must convince you that his contentions on that particular point are more probably true than otherwise before he can maintain his side of the case, and in this case on trial the burden of proving negligence of the company is upon the plaintiff.

The defendant is a corporation and as such it can act only through its officers, agents and servants, and the acts of its officers, agents and servants performed within the scope of their duties are the acts of the corporation, and their negligence if you should find that they were negligent in the performance of their duties is the negligence of the corporation for which it may be liable to respond in damages.

I have used the term negligence, and this means the doing or omitting to do something that a reasonably prudent man [fol. 298] would not do under the same or like circumstances. Due care is measured by the conduct of a reasonably prudent man under a given circumstance. Negligence and due care are relative terms to be judged from each individual case in connection with the circumstances and environments. For illustration, if you saw a man driving an automobile on a wide straight road at the rate of thirty-five miles per hour, it might not seem to you that it was a negligent act, but if the same individual drove the same car at the same rate of speed through a crowded thoroughfare, you would say at once he was careless and negligent so that you can see that negligence and due care are relative terms depending upon surrounding conditions and circumstances. What might be considered a negligent act under some conditions might properly be considered due care under other circumstances. Applying this principle

to the case on trial it should be kept in mind that the defendant was dealing with and that its employees were required to work in connection with a powerful, dangerous, invisible force. Under such conditions due care requires careful attention on the part of the employer to see that its employees are not unnecessarily exposed to danger, and as I shall explain later there was a reciprocal duty on the part of the employees to use caution without exposing himself to danger or the dangers incident to his service. Due care which is only the care exercised by the average prudent person required close attention both on the part of the employer and the employee to avoid accident, as the dangers are more imminent while working around wires heavily charged with electric current than when working on telephone wires carrying little or no current. In order for the plaintiff to be entitled to your verdict, it must appear a little more probable than otherwise that her contentions are true. So in this case if you find that the contentions of the plaintiff are more probably true than otherwise, then she has established her case by the requisite degree of proof required in civil actions, but if you find that the evidence is so evenly balanced that you cannot tell which way the scale tips, or if you find that the scale tips in favor of the defendant, then the plaintiff has failed to establish the essentials of her case by the degree of proof which the law requires in civil cases.

In this case the relation of master and servant existed, and the rules applicable to that relation govern the case. The defendant, the Bradford Electric Company, Incorpo- [fol. 299] rated, was the master, and the deceased, Leon J. Clapper, was the servant. When the relation of master and servant exists, the law imposes certain duties or obligations upon the master, one of which is to furnish a reasonably safe workplace. This does not mean absolutely safe but reasonably safe, having reference to the dangers to be apprehended. Another rule of law applicable to the relation of master and servant is that the master must instruct and warn the servant of all dangers to which he may be exposed or of which the servant is ignorant, or which by the exercise of ordinary care on the part of the servant he is not likely to discover and appreciate, but putting the principle in different language the master owes the servant the duty to instruct and warn him of all hidden dangers of

which the servant is ignorant. It is with respect to these two principles that the plaintiff alleges that the defendant was remiss in its duty. The plaintiff must establish her contentions on at least one of these claims before she can recover. Failure on the part of the defendant to provide a reasonably safe workplace or to properly instruct the deceased might be found to constitute negligence, and if the plaintiff has established either of these allegations to your satisfaction, then your verdict shall be for the plaintiff unless she is barred by the principle of contributory negligence or assumption of risk of which I will speak later.

Contributory negligence is negligence on the part of the plaintiff or in this case on the part of the plaintiff intestate, Leon J. Clapper, which caused or contributed to cause his injury. The defendant having set up contributory negligence on the part of the plaintiff as one of the grounds of defence, the burden is upon the defendant to prove the same by that same degree of proof required by the plaintiff to have proved the defendant's negligence. If you are satisfied by a preponderance of the evidence that the deceased was negligent and that his negligence contributed to his injury, then the plaintiff cannot recover, even though you should find that the defendant's negligence likewise contributed to it; but unless you can find by a fair preponderance of the evidence that the plaintiff intestate, Leon J. Clapper, was negligent and that his negligence contributed to his injury, the defence of contributory negligence would not be sustained. You will determine this question as you determine all the other questions in the case by a fair consideration of all the evidence adduced from the witnesses, the physical circumstances surrounding the accident as you [fol. 300] find them to be and consider all the facts in the light of your general knowledge of such matters using your common sense.

I have also used the term assumption of risk in connection with the defence. Assumption of risk is also a matter of defence, and the burden of establishing it is on the defendant. It is a principle of law applicable to the relation of master and servant that the servant assumes the ordinary risks of his employment that are known to him or which by the exercise of ordinary care on his part should have been known to him and appreciated by him. An employee has a right to assume that the master has performed his

duty in furnishing a reasonably safe place. The servant is not bound to search for hidden dangers, but he is bound to use whatever knowledge he has in a reasonable manner. To illustrate, if a man is hired to pick apples and required to use a ladder, he knows that one of the ordinary risks of the employment is the liability to fall. This would be one of the ordinary risks which he would assume when he accepts the employment. If the ladder was sound and the employee fell he could not recover. He would not be bound to hunt for hidden defects in the ladder furnished him by the master. An employee also assumes the risk of injury from hidden dangers concerning which he has been adequately informed and warned. On the question of instructions and warning I charge you that the law requires the master to instruct and warn employees of all hidden dangers or such as are not obviously known to the employee and appreciated by him. Failure to do so may constitute negligence on the part of the employer. As I have already said, the employee assumes the risk of known dangers whether they are obvious or whether their knowledge is acquired by instruction and warning, but he does not assume hidden dangers or such as he does not know and appreciate or such as are not so great that the ordinary man with knowledge of the dangers would encounter them.

Applying these rules of law to the facts in the case, if the deceased knew there was only one switch at the Haverhill station and that this would cut out the lines one and two and that there was another or third wire installed that was not controlled by a switch, it would not be necessary for the master to instruct the employee concerning these known facts; in other words, it was not necessary and the law does not require the master to inform the employee of what he already knows. If the employee's knowledge is equal to that of the master, no warning or [fol. 301] instruction is necessary. The law does not require a useless formality. In determining whether the servant has assumed a risk, the question of his negligence is not involved. The question is not how he got his knowledge but what knowledge he had. If you find that the decedent Clapper did know and appreciate the risk of making repairs on the Haverhill substation at the time he was injured, then his administratrix cannot recover in this action.

It appears from the evidence that the defendant established a switch at Newbury, Vermont, which when thrown would cut off the current from the three lines of wire at the Haverhill substation. If the deceased knew of this fact and understood the instructions, or, in other words, that it was necessary for him to go to Newbury to open the switch in order to render the Haverhill substation safe to work upon, and he failed to do so, or if he failed to follow instructions, it is evidence that you should consider on the question of contributory negligence on his part. If there are two ways to perform a duty, one absolutely safe and the other dangerous, and the employee appreciates these facts and he chooses the dangerous method and is injured, he is guilty of contributory negligence and cannot recover.

Of course, the defendant had a right to establish a station and switch at Newbury, provided he gave the employee adequate instructions concerning the dangers of using the switch at Haverhill; but there remains in this case a further question whether the instructions given were adequate and impressed upon the deceased the danger of using the switch at Haverhill. Ought the defendant to have anticipated that employees would use the switch more conveniently located at Haverhill, and did the deceased know and appreciate that opening the switch at Haverhill, cutting the current off from the two primary wires of the three phase system would not so insulate the substation as to make it safe to work upon. These are some of the questions for your determination. They are purely questions of fact for you to decide. Of course, you cannot base a verdict for the plaintiff on a guess, surmise or conjecture. A verdict must be based upon evidence. The mere fact that an accident happened creates no presumption of negligence. Negligence is an affirmative fact necessary to be established by the plaintiff in order to recover. Contributory negligence is a defence that must also be established by evidence. If your verdict should be for the defendant, then you will have no [fol. 302] further duties to perform in the consideration of this case, but if your verdict is for the plaintiff, then you will come to the question of damages.

If the plaintiff is entitled to recover for the death of Clapper, the damages are fixed by statute, but the amount cannot exceed $7,000. An administratrix is entitled to recover compensation for the physical pain and suffering of

the deceased if you find that there was any conscious suffering before death. If the death was instantaneous or the deceased was instantly rendered unconscious, then no amount should be assessed for physical pain and suffering. The other elements of damage which you will consider are the reasonable expenses occasioned to the estate of the deceased by reason of the accident, the probable duration of his life and his capacity to earn money. The earning capacity of the deceased and his capacity to earn money means his capacity to earn money for his estate over and above the cost of his living, that is, what he might be able to save for the estate but not what he actually would save.

I have used the expression burden of proof, and, in closing, I want to call your attention to how you determine whether or not the burden of proof has been sustained. It is by a process of weighing the evidence. Evidence is weighed according to its capacity to convince the human mind or understanding of the proposition in support of which it is offered. The weighing of evidence is not a difficult process. It is a process which you go through every day in your associations with men. In weighing the testimony of witnesses in this case, you will give to each one the weight to which you think it is justly entitled and no more, and in doing this you should take in account their appearance on the witness stand, their apparent intelligence, the strength and accuracy of their memory, the opportunity they had to observe the events concerning which they have testified, any contradictions they may have made in their testimony and any interest they might have in the result of this case. In determining the weight of evidence in this case, you are to use your experience in your every day life, separating the true from the false. You are the sole judges of the weight of the evidence.

You can take the case, gentlemen, and determine it upon the law and the evidence as you have heard it here in court, without permitting your verdict to be influenced by sympathy on one side or prejudice against the other. The fact that the plaintiff is an administratrix and the defendant is a [fol. 303] corporation should not make the slightest difference in reaching your conclusion.

You will have with you two blank verdicts. The first one that I open is headed: District Court of the United States, District of New Hampshire, No. 564, Law, Jennie M. Clap-

per, Administratrix of the estate of Leon J. Clapper, against Bradford Electric Light Company, Incorporated. Verdict. The jury find in favor of the plaintiff and assess damages in the sum of — dollars and — cents. If the verdict of the jury is for the plaintiff, you will write in in words the amount of the damages and sign and return that verdict.

The other verdict is entitled the same and reads: The jury find in favor of the defendant. Mr. Foreman, if the verdict of the jury is for the defendant, you will sign and return that verdict. Take the case.

Mr. Hughes: The defendant excepts to the Court's refusal to grant defendant's requests for instructions, Nos. 1, 7, 10, 12, 14, 19, and 21.

IN UNITED STATES DISTRICT COURT

WAIVER OF BOND ON APPEAL—Filed January 30, 1930

In the above entitled action the plaintiff hereby waives the filing of a bond by the defendant on the transfer of said action to the Circuit Court of Appeals.

Robert W. Upton, Attorneys for Plaintiff.

IN UNITED STATES DISTRICT COURT

DEFENDANT'S PETITION FOR APPEAL—Filed April 1, 1930; Allowed April 2, 1930

[fol. 304] Now comes the defendant, the Bradford Electric Light Company, Inc., believing itself aggrieved by the verdict of the jury and the judgment entered on the ninth day of December, 1929, by Hughes & Burns, Its Attorneys, and petitions said Court for an order allowing said defendant to appeal to the Honorable the United States Circuit Court of Appeals for the First Circuit under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of the bond which the defendant shall give and furnish upon said appeal, and that all further proceedings in this court be suspended and stayed until the determination of said

appeal by the United States Circuit Court of Appeals for the First Circuit. And your petitioner will ever pray.

Bradford Electric Light Company, Inc., by Hughes & Burns, Its Attorneys.

Concord, N. H., April 2, 1930.

Petition for Appeal allowed.

George F. Morris, U. S. District Judge.

IN UNITED STATES DISTRICT COURT

DEFENDANT'S ASSIGNMENT OF ERRORS—Filed April 1, 1930; examined and allowed April 2, 1930

Now comes the defendant in the above entitled action, and files the following assignment of errors upon which it will rely, and says that the Court erred in the following particulars:

(1) That the Court against the seasonable objection and exception of defendant denied the defendant's brief statement and motion to dismiss, which was as follows:

"Now comes the defendant in the above entitled action, and defends and says that it is not guilty in manner and form as alleged by plaintiff in her writ and declaration, and it is ready to verify.

[fol. 106] And further answering, the defendant says

1. That it is a corporation duly established under the laws of the State of Vermont and having a principal place of business at Bradford in said State of Vermont.

2. That Leon J. Clapper at the time of his death and for some time prior thereto was a resident of said Bradford, Vt.

3. That said Bradford Electric Light Company, Inc., hired the said Leon J. Clapper in the State of Vermont to work within and outside of said State.

4. That the said Leon J. Clapper while in the employ of said defendant was killed at Haverhill in the County of Grafton and State of New Hampshire on July 30, 1926.

5. That the defendant has accepted the provisions of t Workmen's Compensation Act for the State of Vermo

6. That the General Laws of the State of Vermont re lating to Labor, Chapter 241, Section 5763, provide a follows:

'Election of Employer or Employee.—The provisions o this chapter, except sections five thousand seven hundre and sixty-six, five thousand seven hundred and sixty-seve and five thousand eight hundred and twenty-six, shall no apply to an employer or employee unless prior to the in jury they shall have so elected by agreement, either expres or implied, as hereinafter provided. Such agreement shall be a surrender by the parties thereto of their rights to any other method, form or amount of compensation or deter mination thereof than as provided in this chapter, and shall bind the employee himself, his widow, the employee's widower, personal representative, and next of kin and de pendents as hereinafter defined, as well as the employer and those conducting his business during bankruptcy or insolvency.'

7. That the General Laws of the State of Vermont re lating to Labor, Chapter 241, Section 5765, provide as follows:

'Same; as to Contracts Made Subsequent to July First, Nineteen Hundred and Fifteen.—Every contract of hiring, verbal, written or implied, made subsequent to July first, nineteen hundred and fifteen, shall be presumed to have been made subject to the provisions of this chapter, unless there is, as a part of such contract, an express statement in [fol. 306] writing prior to accident, either in the contract itself or by written notice by either party to the other and to said commissioner, that the provisions of this chapter, other than sections five thousand seven hundred and sixty six, five thousand seven hundred and sixty-seven and five thousand eight hundred and twenty-six, are not intended to apply, and it shall be presumed that the parties have elected to be subject to the provisions of this chapter and to be bound thereby. In the employment of minors, this chapter shall be presumed to apply unless the notice is given by or to the parent or guardian of the minor. The agreement for the operation of the provisions of this cha

ter, other than sections five thousand seven hundred and sixty-six, five thousand seven hundred and sixty-seven and five thousand eight hundred and twenty-six, may be terminated by either party upon sixty days' notice to the other and to said commissioner, in writing prior to any accident.'

8. That the General Laws of the State of Vermont relating to Labor, Chapter 241, Section 5770, provide as follows:

'Injuries Outside of State.—If a workman who has been hired in this state receives personal injury by accident arising out of and in the course of such employment, he shall be entitled to compensation according to the law of this state even though such injury was received outside of this state.'

9. That the General Laws of the State of Vermont relating to Labor, Chapter 241, Section 5774, provide as follows:

'Right to Compensation Exclusive.—The rights and remedies granted by the provisions of this chapter to an employee on account of a personal injury for which he is entitled to compensation under the provisions of this chapter, shall exclude all other rights and remedies of such employee, his personal representatives, dependents or next of kin, at common law or otherwise on account of such injury. Employers who hire workmen within this state to work outside of the state, may agree with such workmen that the remedies under the provisions of this chapter shall be exclusive as regards injuries received outside this state by accident arising out of and in the course of such employment, and all contracts of hiring in this state shall be presumed to include such an agreement.'

[fol. 307] 10. That the General Laws of the State of Vermont relating to Labor, Chapter 241, Section 5762, provide as follows:

'General Powers of Commissioner.—Questions arising under the provisions of this chapter, if not settled by agreement of the parties interested therein with the approval of said commissioner, shall, except as otherwise provided, be determined by said commissioner. The decisions of said

commissioner shall be enforceable by the county court under the provisions of section five thousand eight hundred and nine. From such a decision an appeal shall lie in the same manner as other appeals from said commissioner; but in no case shall such an appeal operate as a supersedeas or stay unless said commissioner or the court to which such appeal is taken, shall so order.'

11. That the said Leon J. Clapper was subject to the provisions of the Workmen's Compensation Act of said State of Vermont as he had not filed with his employer or with the Commissioner of said State of Vermont, before the injury complained of, a declaration electing not to accept the provisions of the Workmen's Compensation Act of said State of Vermont as provided by said Act, and as further provided by said Act was presumed to have been operating under the contract of employment as defined by the Compensation Act.

12. That to permit the said plaintiff to maintain her common law action would be

(a) Contrary to the laws of the State of Vermont, the said Leon J. Clapper having at the time of his death accepted the provisions of the Workmen's Compensation Act for said State.

(b) A breach of his agreement with said Bradford Electric Light Company, Inc., to accept compensation under the provisions of the Workmen's Compensation Act, and

(c) Would work a great hardship, and perpetrate a fraud on said Bradford Electric Light Company, Inc.

13. That the acceptance of the provisions of the Workmen's Compensation Act for said State of Vermont by the said Leon J. Clapper, as above specifically set forth, is a bar to the plaintiff's present common law action.

14. That this Court has no jurisdiction over the parties to, or the subject matter of, said suit.

[fols. 308-314] Wherefore said defendant prays that the Court dismiss the plaintiff's common law action, and for such other and further relief as may be just.

(2) That the Court, against the seasonable objection and exception of defendant, granted plaintiff's motion to reject the defendant's brief statement, which was as follows:

"Now comes the plaintiff and moves that the brief statement of defense submitted by the defendant under the plea of the general issue be rejected for the following reasons:

(1) That the Workmen's Compensation Law of Vermont has no extra-territorial force or effect and does not control the rights of the parties in this litigation.

(2) That the rights of the parties to this action are determinable solely by the Laws of the State of New Hampshire.

(3) That the plaintiff's cause of action accrued under and by virtue of the Laws of New Hampshire, the injury causing the death of the plaintiff's intestate occurring while he was employed within said State.

(4) That the matters set forth in the defendant's brief statement do not constitute a valid and legal defense to the plaintiff's cause of action."

(3) That the Court, against the seasonable objection and exception of defendant, denied the defendant's motion to dismiss based upon the grounds stated in its rescript which was as follows:

"This matter came on for hearing upon plaintiff's motion to reject the defendant's answer filed under the general issue.

Upon hearing the parties it appears that the special matter pleaded which is really a plea to the jurisdiction to the Court must be overruled and the case set for trial on its merits.

Actions under the Employers' Liability Act in New Hampshire are based on tort not on contract and the law of Vermont has no extra-territorial effect.

It is alleged that the deceased Leon J. Clapper accepted the provisions of the Workmen's Compensation Act for the State of Vermont, but it appears from the pleadings and the argument of counsel the only acceptance upon which the

defendant relies is the failure of the deceased to file a declaration electing not to accept the provisions of the Act. Defendant's motion to dismiss is denied."

[fol. 315] Wherefore said defendant prays that the foregoing assignment of errors may be allowed.

Bradford Electric Light Company, Inc., by Hughes & Burns, Its Attorneys.

Concord, N. H., April 2, 1930.

Examined and allowed.

George F. Morris, U. S. District Judge.

[fols. 316 & 317] Citation, in usual form, showing service on Jennie M. Clapper, omitted in printing.

[fols. 318 & 320] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 321] Lenard L. Drew, duly sworn, testifies as follows:

Direct examination.

By Mr. Upton:

Q 1. What is your full name?

A. Lenard L. Drew.

Q. 2. Where do you live?

A. Newport, Vermont.

Q. 3. What is your occupation or profession?

A. I am superintendent of the Newport Electric Light Company.

Q. 4. How long have you been employed in that capacity?

A. 23 years.

[fol. 322] Q. 24. Now did you know Leon Clapper?

A. I did.

Q. 25. How did you know him?

A. Leon Clapper was taken onto the Newport Electric Light Company as a helper. I don't want to be awfully [fol. 323] exact about this. I would say in about 1922.

Q. 26. He worked for the Newport Company about how long?

A. I would think right around a year, about a year and a half.

Q. 27. And that time he was under you?

A. He was under me in a way; that is, I was superintendent of the company, but I was putting in electric work, making quite extensive changes in the Bradford station and was away from Newport very nearly all the time.

Q. 28. You say that he was employed as helper?

A. Yes.

Q. 29. And in a general way what kind of work was he required to do while working for the Newport Company?

A. That would be, he would go to work as an ordinary laborer; he would dig post holes, help set poles, handle poles and wires and anything that occurred on the ground.

Q. 30. Was it work that required a technical knowledge of electricity?

A. Certainly not.

Q. 31. He worked there with you over a year. You knew what he next did?

A. No, but after the young fellow got on construction and began to learn to climb one day and another he got knowledge and that was finally termed as a lineman.

Q. 32. While he was working for the Newport Company?

A. Climbing while he was at the Newport Electric Light Company.

Q. 33. Did you shift him to some other work?

A. Transferred him from Newport to Bradford.

Q. 34. Did you have some connection with the Bradford Company at that time?

A. I was superintendent of the Bradford Company.

Q. 35. How long a time were you superintendent for the Bradford Company?

A. Will say sometime in 1922. I would not want to be exact about that.

Q. 36. You took that position in 1922?

A. Yes.

[fol. 324] Q. 37. And continued as superintendent of the Bradford Company how long?

A. Until May 1, 1926.

Q. 38. In that time did you also act as superintendent for the Newport Company?

A. Yes.

Q. 39. Over this period you were superintendent of both companies?

A. Yes, sir.

Q. 40. About how long was it that Leon worked for the Newport Company?

A. About a year and a half, I should say.

Q. 41. From the Newport Company he went direct to the Bradford Company?

A. Yes.

Q. 42. And continued to work there until his death?

A. Yes.

Q. 43. What kind of work did he do for the Bradford Company?

A. While I was in Bradford, we had to have someone to do the service work, going out on any troubles that might occur, and Mr. Clapper's work was pretty nearly wholly that kind of work.

Q. 44. What in a general way did service work include. What did service work mean doing under such conditions?

A. If a man telephones that his lights are out, the company has to send a man to find out what the trouble is and correct it if he can.

Q. 45. Correcting trouble. Is that all the work service means?

A. Yes.

Q. 46. Does he do any new work?

A. He would be required to make services.

Q. 47. Services, what do you mean?

A. Connecting up buildings.

Q. 48. And the current would be what voltage on the lines if they were charged?

A. 2300 volts.

Q. 49. Some would be less going into buildings?

A. 220 volts in the largest we usually put in, either 110 or 220.

Q. 50. Now you say his work was largely of this kind?

A. Yes.

[fol. 325] Q. 56. Now during the period that Clapper was under you, let me ask you to tell us what work he would be

called on to do, if anything, on the 6600 volts or the 13,000 or the 33,000 volt lines?

A. During his work he might have had to put in fuses on the 6600 volt line. I don't think he ever had any work to do on the 13,200. The 6600 volt line runs to Fairlee and quite often during a thunder storm we lost fuses on the 6600 volt line.

Q. 57. The 33,000 volt line, was he called on to do any work on or about that line?

A. No, sir.

Q. 58. Take up transformers, for instance, was he ever required to do any work on the interior of a transformer?

A. No, sir.

Q. 59. Was the type of circuit or system which you had there when you took charge in 1922 one phase or two phase?

A. Two phase.

Q. 60. Two phase?

A. Yes, sir.

Q. 61. Did you have any one phase in 1922?

A. Single phase.

Q. 62. And two phase?

A. Yes, sir.

Q. 63. How much of it was two phase in 1922?

A. Very little, just our power circuit.

Q. 64. Will you tell us what towns in a general way were supplied by the Bradford Company?

A. You mean in 1922?

Q. 65. We will take it in 1925. I would like to get some idea, or 1926 when you left. I would like to get some idea of the extent of the system.

A. In 1926 when I left we were serving the Adams Paper [fol. 326] Company at Wells River, Newbury, Concord, Bradford, Fairlee, Earley, North Barre, Thetford, Thetford Hill, Thetford Center, Post Mills and West Fairley on the Vermont side. On the New Hampshire side, Littleton, Lisbon, Bath, Woodsville, North Haverhill, Haverhill, Piermont, Waterford, and Lyme. I may have omitted some of them, but that is as near as I can remember.

Q. 66. Now you said when you entered the employ of this defendant you had only two phase systems. When was the

third phase system installed? When was that brought into your system anywhere?

A. I think the station was remodeled in the Fall of 1923 or the Spring of 1924, I can't tell which.

Q. 67. So that your changes permit the use of the three phase?

A. Yes.

Q. 68. Do you recall when you had the line or lines in operation, when you first had it in operation?

A. In 1924, I think.

Q. 69. Was your whole system converted or to what extent was the change made?

A. We put in a substation at Bradford and ran 13,000 into Woodsville.

Q. 70. That is another line from the one we were talking about?

A. That is the one we are talking about.

Q. 71. Was that three phase?

A. That is three phase, 13,200.

Q. 72. Was that made over into three phase while you were there?

A. New line.

Q. 73. I meant was that a part of the line on which this accident occurred?

A. Yes, sir.

Q. 74. You know the station at North Haverhill?

A. Yes, sir.

Q. 75. Was that a three phase station, substation?

A. Single phase.

Q. 76. I thought we were talking about three phase at Haverhill?

A. As I understand the question, you asked me at what time we ran a three phase line out of Bradford. That I think was in 1924 which was a new steel line built from the Bradford electric light station to the station at Woodsville, carrying 13,200 volts.

[fol. 327] Q. 77. Did that include the substation at Haverhill where this accident occurred?

A. Yes.

Q. 78. Was that a three phase?

A. Single phase.

Q. 79. When you say it was a three phase?

A. The main line was three phase.

Q. 80. But the station?

A. The station itself was single phase.

Q. 81. What other three phase systems did you have when you left there in May, 1926, if any?

A. We have 33,000 volt, three phase. We had a 6,600 volt, three phase running down as far as Northboro, Vermont.

Q. 82. Now this 33,000 volt line ran where?

A. Ran from Wilder to Littleton.

Q. 83. A direct line?

A. Yes.

Q. 84. And let me ask you, did it parallel your 13,000 volt line running from Bradford to Newport at any point?

A. Taking the same line, taking the same pole line from Bradford to Woodsville.

Q. 85. Did the 13,000 volt line or the 33,000 volt wires over that ran parallel?

A. From Bradford to Newbury.

Q. 86. On the same pole?

A. Yes, sir.

Q. 87. From Bradford to Woodsville?

A. Bradford to Newbury.

Q. 88. What was the station?

A. The 33,000 volt line took the place of the old 13,000 volt. That was on top of these steel poles. We made the old 13,200 line a 33,000 volt line from Bradford to Newbury, and used a portion—that is, we run back from Newbury to South Newbury and as a matter of I would say two miles four feet underneath, or about four feet underneath the 33,000 volt line to feed Haverhill.

Q. 89. For a distance of two miles the 33,000 volt wires and the 13,200 were on the same poles?

A. Yes.

Q. 90. The 33,000 being uppermost or at the top?

A. Yes.

Q. 91. Now what experience, if any, did Leon Clapper have on any of these three phase systems while under your [fol. 328] employment, what work did he do about them, if any?

A. Practically none, as I remember.

Q. 93. Now I will ask you what work he had to do on the live wires, if any, on or about wires charged with electric current?

A. A thing like that is pretty hard to explain; a question like that is hard to answer.

Q. 94. Yes, do the best you can.

A. The men were not supposed to handle wires alive unless it was an absolute necessity. Pretty nearly everyone of them, in fact, all of the men that shoot trouble, if you want to call it trouble shooting, fuse off transformers without pulling the current, using rubber gloves.

Q. 95. What do you mean by fuse off?

A. Every transformer had fuses. Quite often in the case of a thunder shower we would lose perhaps fuses on one transformer, perhaps a dozen fuses would have to be renewed.

Q. 96. I was asking more particularly with reference to Mr. Clapper. Did Clapper's work take him about live wires or dead wires. What was the character of the work of his in that respect.

Mr. Hughes: I object to your interrupting him when he is explaining; that is my objection.

The Witness: I don't know whether I can answer that intelligently or not. If there was trouble reported to the station a station man might get hold of Mr. Clapper and tell him that West Fairlee was out. Now if they were out, he would have to go to West Fairlee and chase that out himself. Those wires would be dead if the lights were out. If just a transformer, the main line would be alive and he would use his own discretion as to whether he could repair that trouble with the current on if it was fused or disconnect it and kill it if the lights were out.

Q. 97. You have spoken of just one class of work. My question was about the work in general. Was it on live or dead wires?

A. Dead wires.

[fol. 329] Q. 98. Live or dead chiefly, what do you say?

A. I would say chiefly dead.

Q. 99. Did he so far as you know do any [illegible] constructing and installing a three phase substation?

A. Never to my knowledge.

Q. 100. Did he do any work which might be called electrical engineering?

A. No, sir.

Q. 101. We have been talking about a substation. What is a substation? What is that term applying on such a system as we have here?

A. It might be, I suppose we call a pole with a transformer on it a substation. Ordinarily, a substation like your Littleton substation here is a steel structure. It has got disconnects at the top of the pole, remote control switches that open the line between here and Bethlehem, contains transformers, contains lightning arresters, contains disconnect switches on those transformers on the high side.

Q. 102. What is common to any substation—of course they vary some; you have transformers, one or more transformers?

A. Yes.

Q. 103. What about disconnecting switches?

A. Disconnecting switches always.

Q. 104. Always disconnecting switches?

A. Yes.

Q. 105. In other respects, these substations vary according to the service to be given?

A. Yes, sir.

Q. 106. Some of the current is stepped down and some is stepped up?

A. Yes.

Q. 107. You say stations are equipped with switches. What are they used for?

A. Disconnect the substation on the high side.

Q. 108. For what purpose?

A. In case you want to take the transformer, to kill the station.

Q. 109. When you say kill you mean to cut off the current?

A. Yes, sir.

Q. 110. And when you left there on May 1, 1926, was there any switch on the system as far as you knew which [fol. 330] would not do that? Was there any switch which would not if thrown, if open, which would not kill the station? Did you have any switches installed on May 1, 1926, when you got through which if thrown, that is, opened, would not kill the station?

A. No.

Q. 111. On May 1, 1926, what was the station at Haverhill? What kind of a station did you have there?

A. Single phase, it was a single phase station with two steel poles, two steel girders across between the two poles. On those girders was mounted one transformer.

Q. 112. How many wires came into that station?

A. Two on the primary end.

Q. 113. By primary you mean feed wires?

A. Primary on the side toward the station.

Q. 114. Primary wires are those that bring in the current?

A. Yes, sir.

Q. 115. What kind of a switch was that, if any?

A. Delta star switch, as I remember it.

Q. 116. Installed how?

A. Installed over near the top of the pole with a control handle at the base of the pole.

Q. 117. You don't tell me where the switch was? Of course, it was in the wires or between the wires?

A. Between the wires and the transformer, between the wires on the substation. The line came in on the top and came, each wire, into the delta star switch.

[fol. 331] Q. 122. And was there such a switch in each of the primary wires?

A. Yes, sir.

Q. 123. You say there were two coming into the station?

A. Yes, sir.

Q. 124. Now you were not working for the Bradford Company when the station was built over?

A. No, sir.

Q. 125. That was done after you left?

A. It must have been. I don't know anything about it.

By the Court:

Q. 126. You are referring now to the Haverhill substation?

Mr. Upton: Yes, your Honor, I am referring to the Haverhill substation, the station on which Mr. Clapper was killed on July 30, 1926.

The Witness: I have never seen that station since I left Bradford.

By Mr. Upton:

Q. 127. It was altered. What you described was done after you left?

A. Yes, sir.

[fol. 332] Q. 136. Now it appears that three primary wires are coming into this station, three feed wires are designated here as 1, 2 and 3. There is a disconnect switch in wires 1 and 2 and none in the third wire. What effect would throwing the switch, that is, opening the switch, have on the station, assuming the feed wires are charged with 13,000 volts of electricity?

A. Kill the voltage on the whole station and disconnect 1 and 2. I said it killed the voltage on the whole station, on the entire station and disconnect primaries 1 and 2.

Q. 137. Describe just particularly what it does, how it leaves the station in what condition?

A. It leaves the station energized as far as voltage is concerned.

Q. 138. What part of it?

A. But no voltage.

Q. 139. In that condition would there be any danger to a person working about the station if he came in contact with either one or two primary wires, or any part of them?

A. He would be in danger in connecting himself with any one of the three wires of equal danger, No. 3, No. 2 and No. — representing the same voltage, 13,200.

Q. 140. Notwithstanding that when they are connected between the station one and 2 have been broken by the switch?

A. Yes.

Q. 141. More particularly what would be the danger about it, if there be any danger?

[fol. 333] A. The danger would be just as great if a man got in contact with any one of those wires as he would if the disconnects were not pulled.

Q. 142. Will it hurt him any if he came in contact?

A. I should expect it would.

Q. 143. What?

A. Probably kill him.

Q. 144. Now 1 and 2 on the state of facts put to you, would be disconnected from the station or source of supply?

A. Yes.

Q. 145. Why is it they remain energized? What produces or permits that condition to remain to exist?

A. There is a mechanical connection between all of those wires inside your transformer.

Q. 146. Would you step over to that chalk and explain it to us with reference to the chalk?

A. I can's see as that would help. The ordinary transformer usually has four coils inside, two secondaries, two primaries. The primary coils when they are under construction they are wound around an iron core and the four ends brought up. They bring the other two out primary wires. Now in this hook up one of your primary wires goes to one side of one of the transformers. One of the other primary wires goes to one side of the other transformer. Then your middle wire goes down. The other one of those wires goes down and hooks on to one side of each of the transformers. When they make those splices, they have made that straight out across. The whole thing is hitched together as a whole; consequently, there is a mechanical connection, and as long as there is a mechanical connection it has to be energized. If any one is alive, they all must be alive.

Q. 147. Energized in what way?

A. With voltage through the wire that has not got the disconnect switch.

Q. 148. Referring to this chalk, Plaintiff's Exhibit No. 7, it appears that the third wire, the wire which is referred to as No. 3, connects only with No. 2 transformer. It also appears that is the wire in which there is no disconnect. How would the current if current did come in over that [fol. 334] wire pass into No. 1 and 2?

A. In this diagram No. 3 connects onto the—looking at it from the north side—No. 3 connects into the south side of the transformer marked No. 2. The current would pass from that through the coils of the transformer and out on No. 1. No. 1 wire, there is another tap on the No. 1 wire which goes into the south side of No. 1 transformer. The current would lead through the coils of the transformer and out on No. 2 and up to the disconnect.

Q. 149. Leaving all those wires energized up to the disconnect?

A. Yes, sir.

Q. 150. By all those I mean wires one and two leading to the disconnect?

A. Yes, sir.

Q. 151. What, if anything, could have been done to establish an effective switch there, a switch which would cut off the current when it was thrown over?

A. Put in another disconnect.

Q. 152. Where?

A. On the third wire, on the middle wire.

Q. 153. And if there had been such a switch installed there, that is, a switch in the third wire, what would have been the effect on the station of opening the switch?

A. Kill the entire station.

Q. 154. Leaving the whole station free from current?

A. Yes, sir.

Q. 155. With the wires at the top of No. 1 pole, they would still be energized; everything except that would be dead?

A. Yes, sir.

Q. 156. That reminds me, was there any switch parts, anything at the plant which could have been used for the switch when you left there, that is, a switch in this third wire?

A. I think there were some delta star switches. I don't know how complete they were when I left there.

Q. 157. How much of a job would it be to install such a switch in the third wire so as to make an effective switch at this station?

A. Possibly a day or a day and a half with a couple men.

[fol. 335] Q. 170. Now where is the Newbury substation located, with reference to the road running from Bradford to this substation at Haverhill?

A. I would think a[illegible] two miles, possibly a little more, perhaps a little under, around two miles.

Q. 171. Off the road?

A. I gather you are talking about the road going through

[fol. 336] Bradford, Concord and South Newbury to Haverhill Village.

Q. 172. The natural road to take?

A. I should say it was around two miles.

By the Court:

Q. 173. The substation at Newbury is located near the railroad station?

A. Yes, sir.

Q. 174. And in going from Bradford to Haverhill the nearest way is you go up to South Newbury and cross over the road over to Haverhill?

A. Yes, sir.

Q. 175. Was there at any time a substation or anything which might be called a substation at South Newbury?

A. No, sir; not to my knowledge.

Q. 176. This wire which controls the Haverhill station starts from Newbury Street, Newbury?

A. Yes, sir.

Q. 177. And goes back down the river to South Newbury and across?

A. Right side of the station.

Q. 178. At South Newbury across the river and over the hill?

A. Yes, sir.

[fols. 337-339] Q. 186. Referring to Leon Clapper again, so far as you know had he done any work technically or of a complicated character as to electricity at the time? You had him under your charge?

A. No.

Q. 187. What kind of work was he competent to do?

A. Ordinary lineman.

Q. 188. Can you tell me any more about that as to the character or complexity?

A. I don't know how anyone could explain that intelligently. He was drawing a lineman's pay, the same as the other fellow.

Q. 189. And line work consists of what?

A. Everything pertaining to a line from the ground up.

Q. 190. Construction work, do you mean?

A. Yes, construction work.

Q. 191. Setting poles, running wires, putting up cross arms, is that it?

A. That is it.

Cross-examination.

By Mr. Hughes:

X Q. 192. Mr. Drew, it not only involves setting up of the poles and stringing of wires, but it involves after they are erected the maintenance and repair of them, doesn't it?

A. Yes.

Q. 193. Alive or dead?

A. Yes.

Q. 194. So that from the time that a man begins to work for an electric light company, he gradually acquires the knowledge from the digging of post holes to the maintenance of electrical systems in the air, and the repair?

A. Yes, sir.

[fol. 340] Q. 224. So that there was running from the Bradford plant into the substation at Newbury a high tension line at that time?

A. There was no—I don't quite get that. There was a 13,200 volt wire run from the Bradford station through to Woodsville at that time, and this line into Haverhill was taken off that line at South Newbury.

Q. 225. Then the substation at Newbury was on the line running from Bradford to Woodsville?

A. Yes.

Q. 226. That is, there was 13,200 volt line running into the Newbury substation?

A. Yes, sir.

Q. 227. And on the way to Woodsville?

A. Yes.

Q. 228. When you constructed this line over to the Haverhill substation, you took off from that line running through to Woodsville the current through to this substation at Haverhill?

A. Yes, sir.

Q. 229. Did you install a switch there to control this line running through from the Newbury station, substation, to the Haverhill substation?

A. No.

[fol. 341] Q. 230. Did you afterwards?

A. Yes, 1925. This question you asked me was back in 1924, the latter part of 1923.

Q. 231. What I want to get for the jury without wearying them and to give them the history of the construction there, when was the Haverhill substation built?

A. I think in 1924.

Q. 232. Then in 1924 you ran a 13,200 volt line from the Newbury substation to the Haverhill substation?

A. No, sir. When that line was constructed we ran a line from Bradford electric light station through South Newbury through Newbury to Woodsville, and at that time

the single phase circuit was taken off from this 13,000 volt line at South Newbury; that was when it was first installed.

Q. 233. Now that main line running through from the Bradford power station to Woodsville was built in 1924?

A. I think it was. It might have been the latter part of 1923.

Q. 234. And that was a three phase system?

A. Yes, sir.

Q. 235. And that was carrying 13,200 volts?

A. Yes, sir.

Q. 236. And Mr. Clapper was working for you at that time?

A. He was working for me at that time, yes, sir.

Q. 237. In 1925 you tapped in at the Newbury substation and constructed a single phase line from the Newbury substation to the Haverhill substation, is that correct?

A. We changed it in 1925. The new line went in 33,000 volts which changed the construction of those two poles; then we fed back from Newbury to South Newbury and into the Haverhill station.

Q. 238. So that coming into 1925, you had running into the Newbury substation a 33,000 volt line and a 13,200 volt line?

A. We took that off from the 33,000 volt line with the substation at Newbury and stepped it down.

Q. 239. From 33,000 to 13,200?

A. Yes.

Q. 240. Then you carried 13,200 volts through on single phase to the Haverhill substation?

A. Yes.

Q. 241. Did you put a switch in at Newbury to control 13,200?

A. Yes, sir.

[fol. 342] Q. 250. Then that disconnect switch that you put in at the Haverhill substation was for the immediate use of the station itself?

A. Yes, sir.

Q. 251. And then you also had at the station at Newbury a disconnect switch which killed not only the line to Haverhill, but also the substation at Haverhill, that is right?

A. Yes.

Q. 252. And that was perfectly proper construction for you, was it?

A. Yes.

Q. 253. So that that station at Haverhill there could be operated at your discretion either from the substation at Newbury or from the substation at Haverhill?

A. Yes.

Q. 254. But the operation of that switch at the Haverhill substation would not effect the primary line between the Haverhill substation and Newbury?

A. No, sir.

Q. 255. How far back was it?

A. I would say approximately three miles and a half, possibly four miles, I don't know exactly.

. . . . . .

Q. 259. Then as you understand it, there was a third wire ran in from the Newbury substation to the Haverhill substation?

A. Yes.

[fol. 343] Q. 260. And that set up what you call a three phase system?

A. Yes, sir, according to the photograph.

Q. 261. So there was no more current going into the Haverhill substation then than there was before the third wire was put in?

A. No, sir.

Q. 262. Now the usual method of stringing that wire would be to string it right alongside of the other wires up on cross arms and tie it into the Haverhill substation?

A. You mean the third wire, yes, if there was room.

Q. 263. And Mr. Clapper was a man who was capable of running that wire from what you knew of him?

A. Most any lineman would be capable of doing it.

Q. 264. Not only capable of tying it into the Newbury substation, but he would be able to run it from the Newbury substation to across the line to the Haverhill substation?

A. I should expect so.

Q. 265. Mr. Clapper from your knowledge was thoroughly familiar with these disconnect switches and their nature?

A. I don't know why he wasn't. I should expect he was.

Q. 266. You would say he would know about the switches without any question?

A. I should.

Q. 267. He would know about disconnect switches?

A. I should expect so.

Q. 268. And if there were three wires and one of them, two of them, had disconnect switches on and the third one did not have, he was a man capable of knowing that?

A. I should expect he was.

Q. 269. Now as you look at this photograph, it would be apparent to anybody that looked at the switch?

A. I should expect so, if they knew what they were looking for.

Q. 270. The ordinary man if he looked up at this pole and saw there were two disconnect blades there that operated on the switch lever, he would know that the third was not switched?

A. Yes.

Q. 271. And Mr. Clapper was thoroughly familiar with that sort of work?

A. Yes, sir.

[fols. 344 & 345] Q. 272. He was from your knowledge of him, he was a man who was familiar enough to know if a wire was not connected to a disconnect switch that he ought to find the switch that controlled that wire anyway?

A. That is something that any lineman would know.

Q. 273. So that if the company established at the Newbury substation a switch for him to pull after the installation of that third wire, he was capable of knowing that fact, wasn't he, from what you know of him?

A. Yes, sir.

[fol. 346] Q. 296. When Mr. Clapper was working for you at Bradford, you said he was a trouble shooter?

A. I said he was a service man; call it trouble shooter; it doesn't make any difference.

Q. 297. By service man you mean accustomed to do what?

A. Anything that might be called on him to do at that time it occurs.

Q. 298. You mean go up into the air with the current on or off?

A. He might go up in the air to fuse a transformer, yes.

Q. 299. Day or night?

A. Yes.

Q. 300. And the wires would be alive when he went up?

A. Yes, unless he killed them.

Q. 301. If he went up to fuse the ordinary line or the ordinary transformer, the current, there would be current on one side of the fuse boxes and no current on the other. He would be up against the current?

A. Yes.

Q. 302. When he put the fuse in that would make a connection and the current would go through the transformer? [fols. 347 & 348] A. Yes.

Q. 303. How many years was he doing that kind of work?

A. I don't know.

Q. 304. For you?

A. They shot me around so much it is hard to get the information definite; possibly a year, sometime a little over a year. I guess from the latter part of 1924 when we went on construction during 1925.

Q. 305. And he was a competent man to look after electrical troubles?

A. He was an ordinary lineman.

Q. 306. And by an ordinary lineman, you mean he was a good as the average man?

A. I should call him the average lineman, yes.

Q. 307. And he had the ordinary capacity of men that work under you in like lines of work?

A. Yes.

Q. 308. You felt that he was perfectly competent to go up into the air at night to take care of those electrical troubles while working for you?

A. I certainly did.

Q. 309. You did not hesitate to trust him on electrical work whether the wires were alive or dead?

A. He was like any other man in the gang. He was sent on troubles which might come up; he just happened to be that man.

Q. 310. Referring to him, he was a man whom you considered as a capable man to go up onto wires that were alive or dead at night or day time or any other time?

A. Yes.

Q. 311. And from your knowledge of him, he was capable of understanding those wires in the air as he worked on them?

A. Yes.

[fol. 349] Q. 324. You spoke of remote control, Mr. Drew, with reference to your lines; what did you mean by remote control?

A. Well, I meant in a case like this switch, we call that a remote control switch simply because you throw the switch from some other source than right at the switch itself.

Q. 325. Then you would refer to the switch at Newbury substation which controlled that line and the Haverill station as remote control, would you?

A. The Haverill substation, yes; the Newbury station was a little different type of station. You pulled it with a stick instead of a handle like this.

Q. 326. As far as the control of that line and substation was concerned, if the control was fixed at Newbury substation, that would be remote control as you described it, is that what you mean?

A. That particular type switch at Newbury is a stick; there is a switch that you pull with a stick. The disconnect rod made for the purpose pulls them out one at a time.

Q. 327. Pulls the disconnect rod down?

A. Yes.

Q. 328. The control of that station would be subject to the pulling down of those disconnects at the Newbury substation?

A. Yes.

Q. 329. So that this station here, as you understand it, could be controlled either at the Newbury substation while you were there, or it could be controlled from the Newbury substation after you left and this new wire was put in?

A. Yes.

(Afternoon Recess.)

Q. 330. Mr. Drew, you were asked the question by Brother Upton that to make such a switch as this effective you would have to put in another disconnect switch on that third wire?

A. Yes, sir.

Q. 331. To make this particular switch effective?

A. To be able to kill this particular station entire.

[fol. 350] Q. 332. At that station?

A. At that station.

Q. 333. It would be perfectly proper for you to put a switch three poles away to control those three wires?

Mr. Upton: I object.

Q. 334. It would be for the purpose of controlling it effectively to put one at the Newbury substation?

A. Yes, sir.

Q. 335. And it could be controlled just as effectively from the Newbury substation as it could from this substation?

A. Yes, sir.

Redirect examination.

By Mr. Upton:

R., D. Q. 336. When you say it would be controlled just as effectively fom Newbury, what do you mean?

A. I mean it could be killed at the Newbury station.

Q. 337. How would that effect in a practical way the doing of work that might come up?

Mr. Hughes: I object.

The Court: I think that question is proper. He may answer.

Mr. Hughes: Will your Honor save us an exception?

The Court: You may have an exception.

Q. 338. I wanted to ask you if you had trouble at this Haverhill station and if you attempted to control it from Newbury, what would you have to do?

A. You would have to drive to Newbury or cause someone at Newbury to open the line if you wanted to kill the Haverhill station.

Q. 399. Let up suppose a man going out alone went down to the Newbury station to disconnect there, went on to Haverhill, found the fuses blown out and he replaced them, what would he have to do then to get his system in operation?

A. Go back to Newbury.

Q. 340. Let us suppose the work was of a kind he wanted to test and wanted to know if it was effective?

A. Have to go back to Haverhill.

Q. 341. And in this case the distance from Newbury to Haverhill is what, I think you said about five miles?

A. Somewhere four or five miles, I should think.

[fols. 351-355] Q. 342. Now you spoke about the Fairlee station and said that it was possible to replace fuses when the current was off. How was that station constructed?

A. The transformer was not hung on the pole on the Fairlee station, but as I remember it, the construction, there was a pole, we will say 12 feet. The transformer was a large one. We will say one pole set up 10 feet and the other one 25 feet, and the transformer set on top of one of them, forming a sort of a shelter, and in my time there was two little wooden houses about that wide, about that long, when you opened the cover, you pulled out the fuse. Those were mounted on the other side of the transformer, and a man with care did not have to get up against the transformer or against the wires.

. . . . . .

Q. 343. Now you have said that Mr. Clapper was capable of knowing whether or not there was a switch in the third wire in this particular substation at Haverhill and that he was capable of understanding electricity. In that connection, I want to ask you whether or not he was capable of knowing after throwing the switch, that is, the switch such as we had there which would disconnect wires 1 and 2, was he? Capable of knowing that the whole station would be energized just the same?

A. I don't know.

. . . . . .

Q. 346. Had he ever had any experience to your knowledge with that kind of construction?

A. No.

Q. 347. You have been asked about the condition of the substation at Haverhill while you had it in charge, while you were superintendent. Was there ever a time when you were superintendent of the station that the station was without an effective switch?

A. No.

Q. 348. As service man or trouble shooter, what part of the system did Mr. Clapper work on?

A. All over the whole system, with the exception of the 33,000 volts.

[fol. 356] Leon L. Drew, recalled, testifies as follows:

[fol. 357] Cross-examination:

X Q. 26. Where, Mr. Drew, did you first come in contact with Mr. Clapper? Did you hire him yourself?

A. Leon Clapper was hired by his brother, Myron Clapper of Newport.

[fols. 358-360] Q. 27. Where?

A. At Newport.

Q. 28. And then he contined to work at Newport under his brother there?

A. Yes.

Q. 29. Up to the time he came to Bradford?

A. Yes.

Q. 30. And when he came to Bradford who hired him at Bradford?

A. I transferred him from Newport back to the Bradford Company.

Q. 31. You being in charge of both companies?

A. Yes.

Q. 32. From that time until the time of his death, he remained under you and Mr. Keith?

A. Yes, sir.

Q. 33. During the whole period as far as you remember?

A. Yes, sir.

[fol. 361] In United States Circuit Court of Appeals for the First Circuit, October Term, 1930

No. 2465

Bradford Electric Light Company, Inc.,

Defendant, Appellant,

v.

Jennie M. Clapper, Administratrix,

Plaintiff, Appellee

Appeal from the District Court of the United States for the District of New Hampshire

Before Bingham, Anderson, and Wilson, JJ.

Opinion of the Court—January 8, 1931

Wilson, J.:

This is an action under the Lord Campbell Act of New Hampshire, Chap. 302, P. L. 1926, to recover for injuries

resulting in the death of the plaintiff's intestate and alleged to have occurred through the negligence of the defendant corporation.

The defendant in the action and appellant in this court is a public utility corporation organized under the laws of Vermont and having its principal place of business in the town of Bradford in Vermont. It is engaged in furnishing electric current for public uses in both Vermont and New Hampshire. The plaintiff's intestate was a resident of Bradford, but received his injuries in the course of his employment in the State of New Hampshire.

The contract of employment of the plaintiff's intestate was entered into in Vermont. His work was that of a line-[fol. 362] man, and at times he performed the duties of a "trouble shooter," or an emergency man, who might be sent out at any time to repair sudden breaks in the lines.

In the evening of the day on which his injuries occurred, he was requested to go across the Connecticut River to restore burned out fuses at a substation in the town of Haverhill, which lies on the east bank of the river in the State of New Hampshire, where in the course of his work he came in contact with high tension wires and received the injuries which caused his death.

The action was originally brought in the New Hampshire Superior Court, and on petition of the defendant was removed to the Federal District Court on the ground of diversity of citizenship the plaintiff being a citizen and resident of New Hampshire. On the third trial before a jury, it resulted in a verdict for the plaintiff for $4,000.

Vermont in 1915 adopted what is known as a workman's compensation act of the elective type, common in most of the states, under which either the employer or employee could adopt its provisions or retain his rights at common law. To induce the employer to assent to be bound by its provisions, he was, in case of refusal, deprived of his common law defenses of assumption of risk, negligence of a fellow servant and contributory negligence; while the employee, in case he did not assent, must meet those defenses in addition to proving that his injuries were due to his employer's negligence. In case both assented and the employee suffered injury arising out of, and in the course of, his employment, he received compensation based on his average weekly wage during his incapacity, whether his

employer was negligent or not, and even though his injury was due entirely to his own negligence, or to that of a fellow servant, or was the result of pure accident.

Both employer and employee under the Vermont Act, as in many of the compensation acts of other states, are presumed to have accepted the act unless notice is given to the contrary. As the court of one state has put it: the failure to give such notice creates an irrebuttable pre- [fol. 363] sumption of assent. Am. Radiator Co. v. Rogge, 86 N. J. L. 436.

Such provisions for the acceptance of the act have always been held sufficient to bind the parties and in no case has any such statute been held invalid as against public policy, or in violation of any constitutional provision on this ground. Opinion of Justices, 209 Mass. 607, 610, 611; Mackin v. Detroit-Timken Axle Co., 187 Mich. 8; American Radiator Co. v. Rogge, supra; Johnston v. Kennecott Copper Corp., 248 Fed. 407; Hopkins v. The Matchless Metal Polish Co., 99 Conn. 457, 460; Cram v. Leonard, Crossette & Riley, 214 Mich. 218; Industrial Com. v. Ins. Co., 64 Col. 480; Rounsaville v. Railroad Co., 87 N. J. L. 371; Pierce v. Storage Co., 185 Iowa, 1346; Foughty v. Ott, 80 W. Va. 88; Chambers v. District Court, 139 Minn. 205; Anderson v. Miller Scrap Iron Co., 169 Wis. 106; Post v. Berger & Gohlke, 216 N. Y. 544; Hosper v. Hungerford Smith, 230 N. Y. 616.

It is also generally held that such a statute on acceptance by both parties becomes a part of the contract of employment and is exclusive of all other remedies in case of injuries; Kennerson v. Thames Towboat Co., 89 Conn. 367, 371; Powers v. Hotel Bond Co., 89 Conn. 143, 147; Hopkins v. The Matchless Metal Polish Co., 99 Conn. 457, 460; Gooding v. Ott, 77 W. Va. 467; Hunter v. Coal Co., 175 Ia. 245; Denny v. Wright & Cobb Lighterage Co., 36 N. J. Law J. 121; Industrial Com. v. Ins. Co., supra; Dettloff v. Hammond, Standish & Co., 195 Mich. 117; Grinnell v. Wilkinson, 39 R. I. 447; Barnhart v. Am. Concrete Steel Co., 227 N. Y. 531; Martin v. Kennecott Copper Corp., 252 Fed. 207.

In terms, the Vermont Act, Sec. 5770, G. L. 1916, covers injuries to employees who are hired in that State, but whose employment requires them to perform work in another state where they are injured. It is now held with but few, if any, exceptions, at least under elective acts, and

whether in terms covering injuries in another state or not, that when assented to by both parties, a Compensation Act of the state of employment, at least in so far as it is administered in that state, will cover injuries received in the course of the employment in another state. In this [fol. 364] sense such acts are said to have an extra-territorial effect. See cases above cited.

Massachusetts in construing its original act in an early decision, Gould's case, supra, held the contrary, and this decision was followed in a few states; but Massachusetts since its decision in the Gould case has amended its Act and in a recent decision, Penderzoli's case, decided January 3, 1930, now holds its Act under a contract of employment entered into in Massachusetts covers injuries received by the employee in another state. The great weight of authority now sustains this construction as the most practical. Otherwise great confusion would result as to the rights and obligations of employer and employee, where employees are sent out of the state to do work.

In this case, as neither the defendant corporation nor the plaintiff's intestate gave notice of a refusal to assent to the Vermont Act, both were bound by it, and its provisions became a part of the contract of employment and cover all injuries whether received in Vermont or New Hampshire, and for which under the Vermont Act no action at common law based on negligence would lie. See cases above cited.

There can be no doubt, therefore, if the proceedings had been brought under the Vermont statute, the plaintiff's intestate could have recovered only the sum provided where there are no dependents; and herein lies the reason for this action. The deceased had no dependents, and as is provided in all such acts (including that of New Hampshire), in such cases only a comparatively small sum to provide for burial expenses is allowed.

As the court said in Wasilewski v. Warner Sugar Refining Co., 149 N. Y. S. 1035, "The plaintiff, however, does not now wish to accept the payment to which he is entitled under the compensation plan. He is advised that his injuries were due to the employer's negligence, and he wishes to take his chances on getting a larger amount through his suit at law."

The comment of the court in the New York case aptly applies to the heirs of the deceased in this case, who probably suffered little financial loss, if any, by his death. Because the accident happened in New Hampshire, they seek [fol. 365] to bring their action under its death statute and recover a larger sum than they could recover under the Vermont law.

At the opening of the trial in the Federal Court, the defendant filed its answer and a brief statement of defense in which it set up the provisions of the Vermont Compensation Act, and the fact that the defendant and the deceased were both residents of Vermont; that the deceased was hired in Vermont and that both the defendant and deceased had accepted the Vermont Act, all of which it claimed was a bar to the action, and moved for a dismissal of the action.

The plaintiff then moved that the brief statement be rejected on the following ground:

(1) That the Workmen's Compensation Law of Vermont has no extra-territorial force or effect and does not control the rights of the parties in this litigation.

(2) That the rights of the parties to this action are determinable solely by the laws of the State of New Hampshire.

(3) That the plaintiff's cause of action accrued under and by virtue of the laws of New Hampshire, the injury causing the death of the plaintiff's intestate occurring while he was employed within said State.

(4) That the matters set forth in the defendant's brief statement do not constitute a valid and legal defense to the plaintiff's cause of action.

This motion was in effect a demurrer to the brief statement and an admission of the facts stated therein.

The District Court, we think, misconceived the nature of the defense set up in the brief statement, probably due to the fact that the plea of the defendant ended with a motion to dismiss the action, and held that it was a plea to the jurisdiction and denied the motion to dismiss on the ground that the Vermont statute had no extra-territorial effect and that the action was under the employers' liability act and was based on tort and not on contract.

From one viewpoint the court's ruling may have been technically correct, but both parties apparently accepted it as a ruling that the facts set forth in the brief statement [fol. 366] did not constitute a good defense to the action. The case was evidently tried upon the understanding that the court had ruled that the Vermont contract was without effect as a defense. Counsel so argued the case before this court on appeal, the defendant having made the court's ruling on these motions its first assignment of error.

The industrial policy embodied in these statutes was borrowed from England and Germany. The first Act in this country was adopted in 1910 in the state of New York, which was declared unconstitutional by the state court. Ives v. South Buffalo Rw'y Co., 201 N. Y. 271.

New Hampshire in 1911 adopted a modified form of a Compensation Law applicable only to certain hazardous employments, one of which was work on electric lines. Like the acts of most of the other states adopted about that time and since, it is elective, but differs in this respect, that the employee or his representative, in case of his death from injuries received in the course of his employment, is not obliged to elect until after the injury occurs.

The defendant company accepted the New Hampshire Act, but neither the deceased nor his representative ever did. While the defendant's reasons for so doing were not disclosed by direct testimony, it appears in the record that its operations extended some distance into New Hampshire, and it perforce must at times, at least, have employed men in that State as well as in Vermont. If it wished to retain its common law defenses as to these men, it must accept the act.

The first and real question to be decided in this case, the relations between the employer and employee being contractual, is whether the law of the lex loci contractus should govern under the well-recognized principles of comity, or the law of the state where the tort occurred.

Under the doctrines of Conflict of Laws there are certain general rules which are well settled; (1) a tort action is governed by the law of the state where the injury occurred; (2) no state law has any extra-territorial effect in the sense that it becomes part of the statutory law of [fol. 367] another state or controls the courts of any other state in administering justice; (3) on the principles of

comity, however, a contract entered into in one state, if valid in that state, will be enforced in the courts of another state unless contrary to its laws or public policy.

These doctrines at the outset raised many new problems in connection with the administration of Compensation Acts, and there has been some conflict of decisions; but there is a clear tendency, we think, for the courts to settle down on the policy of enforcing contracts under them according to the law of the state in which they were made.

Connecticut at one time applied its own compensation law to a contract of employment entered into in New York to be performed in Connecticut, Banks v. Howlett, 92 Conn. 368; but it later limited the decision to the facts in that case, Hopkins v. The Matchless Metal Polish Co., 99 Conn. 457, 460; and finally overruled it in Pettiti v. Pardy Construction Co., 103 Conn. 101, 109.

New York has in one or more cases held that the recovery of compensation in the state of the injury will not prevent recovery in the state of employment, when both employer and employee have assented to the Compensation Act of each state. Jenkins v. Hogan & Sons, 163 N. Y. S. 707; Gilbert v. Des Lauriers Column Mould Co., 167 N. Y. S. 274.

These cases, however, granting compensation in New York when compensation was also allowed in New Jersey, has since been distinguished in Anderson v. Jarrett Chambers Co., 206 N. Y. S. 458, where it was held that, if the contract of employment was a New York contract, and the employment hazardous, the employee could not waive his rights under the New York compulsory statute by the acceptance of compensation under the New Jersey Act; but where the contract was a New Jersey contract and the accident occurred in New York, the New York courts follow Connecticut in that they will not take jurisdiction, but leave the party to his remedy in New Jersey. Minto v. Hitchings & Co., 198 N. Y. S. 610; Schweitzer v. Hamburg-American Line, 138 N. Y. S. 944; also see Mosely v. Empire Gas & Fuel Co., 313 Mo. 225; Pettiti v. Pardy Con-
[fol. 368] struction Co., 103 Conn. 101; Hopkins v. The Matchless Metal Polish Co., 99 Conn. 457; Wasilewski v. Warner Sugar Refining Co., 149 N. Y. S. 1035; Barnhart v. Am. Concrete Steel Co., 227 N. Y. 531; Norman v. Hartman Furniture Co., 84 Ind. App. 178.

The New Jersey court in Rounsaville v. Central R. R., 67 N. J. L. 371, 374, but in a dictum, also intimated that even though compensation had been granted in another state because the accident occurred there, it would not prevent the New Jersey court from granting compensation, provided the contract was a New Jersey contract. The actual decision in this case, however, is not of necessity out of harmony with those holding that it is the lex loci contractus which governs. Hopkins v. The Matchless Metal Polish Co., supra; Norman v. Hartman Furniture Co., supra; Minto v. Hitchings & Co., supra; Schweitzer v. Hamburg-American Line, supra. In the case of Johns-Mansfield v. Thrane, 80 Ind. App. 432, cited by plaintiff to sustain the contention that it is the law of place of injury which governs, it will be found that the contract of hiring in that case was held to be an Indiana contract, while in Norman v. Hartman Furniture Co., supra, the Indiana court refused compensation, though the accident occurred in Indiana, on the ground that the contract was an Illinois contract and the law of that State controlled. Since the decision in the New Jersey case, we think there has been a change in the attitude of the courts toward these laws and their extra-territorial effect.

The New York court, in Minto v. Hitchings & Co., remarked with appropriateness, we think, that it would be "unseemly for a person to seek redress under the law of his own state, succeed, and afterwards institute the same proceedings in a different forum under the law of another state." It would also appear that the converse should be equally unseemly, unless under the circumstances found in Anderson v. Jarrett Chambers Co., supra.

Bradbury in his third edition of his work on Compensation Law, page 88, after reviewing the result of the administration of the law for nearly two decades, says: "It [fol. 369] would seem that the application of the doctrine that the parties should be governed by the workmen's compensation law of the state where the contract of employment was made, would settle very many of the difficulties which are found to arise and any other doctrine would multiply these difficulties."

Counsel for plaintiff contends that it is against the public policy of New Hampshire for an employee to enter into a contract relieving his employer of liability for injuries due

to the employer's negligence; but the rule against contracts relieving an employer of liability for his own negligence is the law in practically every jurisdiction. It is now well settled that Compensation Acts are not contrary to public policy, but are everywhere recognized as humane, economic and in the interest of the employee and the general welfare of the state; and nowhere is this more admirably stated than in Mulhall v. Nashua Mfg. Co., 80 N. H. 194.

When New Hampshire adopted its Compensation Act the constitutionality of such legislation was then being questioned in other states; Ives v. South Buffalo Rw'y, supra. The New Hampshire legislature, out of abundance of caution, not only limited its acts to hazardous employments, but in order to avoid the possibility that it might be held to constitute an agreement to waive liability on account of an employer's negligence, permitted acceptance of the compensation provided in the statute after the injury, upon the theory, it may have been, that it would then be held to be in the nature of a settlement of employee's claim; but this fear, if such it was, has proved groundless, as the cases above cited hold. No other state has adopted such a similar provision for acceptance. That the New Hampshire legislature adopted this peculiar provision in its Act upon the ground that an acceptance of the act before injury would be injurious to the welfare of the people of New Hampshire is highly improbable.

As a rule the Federal courts will follow the decisions of the state courts in interpreting their statutes or in determining the public policy of the state; but the new Hampshire courts have not yet held any Compensation Act of a sister state contrary to its public policy, or passed on the question here involved. We must, therefore, decide the [fol. 370] issues in the light of the decisions of other jurisdictions. In view of the declarations in Mulhall v. Nashua Mfg. Co., supra, however, we cannot conceive of the New Hampshire court of last resort holding as a general proposition that a statute, which has been adopted in so many states, and acclaimed far and wide as one of the most beneficent acts of recent years in promoting the general welfare of the workingman, is contrary to the general welfare of the citizens of New Hampshire on the first grounds urged by counsel.

But it is also urged that the law of Vermont, inasmuch as it presumes the acceptance of its Act from silence, is contrary to the public policy of New Hampshire, since the New Hampshire Act permits acceptance after the injury and also requires a positive act.

If the Vermont Act as a whole is not contrary to the public policy of New Hampshire, can it then be said that, merely because the provision of the Vermont Act as to the acceptance of the Act differs from that of the New Hampshire Act, it is contrary to the public policy of New Hampshire?

No brief all-inclusive definition of what is meant by public policy has yet been evolved. In general it is said that, to be contrary to the public policy of a state, a contract must be inconsistent with good morals, natural justice, or the public welfare or some positive law forbidding it. As to the nature of contracts held to be against public policy and its scope, see 6 R. C. L. 707, et seq., Sec. 114-214; Williston on Contracts, Vol. 3, Chaps. XLIV-XLVIII.

The Washington State court said in 51 Wash. 619: "Comity depends, not alone upon a disposition to favor the citizen of another state or country, but rests upon well-settled principles of practice, expediency and convenience. It is a rule recognized by courts and applied within bounds of discretion. It is based upon the statute law or decisions of other states or countries rather than upon our own. These will be recognized and given force if it be found that they do not conflict with the local law, inflict an injustice on our own citizens, or violate the public policy of the state."

[fol. 371] The United States Supreme Court in Oscanyan v. Arms Co., 103 U. S. 261, 277, said, as a matter of comity: "the general rule undoubtedly is that the validity of a contract is to be decided by the law of the place where it is made, unless it is to be performed in another country; but to this, as to all general rules, there are exceptions, and among these Story mentions contracts made in a foreign country to promote or toward the commission of crime, to evade or evade the due administration of justice, or cheat public revenue, or to affect the public rights, and other contracts which in their nature are forbidden by moral turpitude and are inconsistent with the good order and solid interests of society. 'All such contracts,' he adds, 'even though

they might be held valid in a country where they are made, would be held void elsewhere, or at least ought to be, if the dictates of Christian morality, or even of natural justice, are allowed to have their due force and influence in the administration of international jurisprudence.' Story, Conflict of Laws, Sec. 258."

As to what acts are injurious to the welfare of the public, legislative bodies in enacting statutes may differ, it is true. Contracts may be valid in one state and be invalid by express prohibition in another. The adoption of a Workmen's Compensation Act may properly be held to establish a public policy in a state and any contract contrary to its general aim and purpose may be held contrary to its public policy.

The Supreme Court of the State of Washington, however, in Reynolds v. Day, 79 Wash. 499, although it had, by a compulsory compensation act as to hazardous employments, and by voluntary assent as to non-hazardous, done away with the old common law remedy for injury through negligence, which its legislature declared to be "inconsistent with modern industrial conditions," enforced a common law remedy of a sister state on the ground of comity and held it was not contrary to the public policy of Washington, as it still retained the common law remedy in certain cases.

If it should be held, however, that every provision of these Compensation Acts established a definite public policy for the state adopting it, then it would follow that a state which required a positive act of acceptance by the [fol. 372] employer would be against the public policy of a state which presumed his acceptance, unless he gave notice, and vice versa; or a state having an act applying to hazardous employments, such as New York, would hold an act covering also non-hazardous occupations, as New Jersey or Connecticut, was contrary to its public policy, or an act granting fixed weekly sums for certain injuries is contrary to the law of state basing compensation for all injuries on a percentage of the average weekly wage. But details of this nature have never been regarded as establishing a definite public policy as to each detail. Otherwise we should have the confusion which the courts have been seeking to avoid by holding that the law of the lex loci contractus should govern where the injury occurred in an

other state, since few of these acts are an exact counterpart of any other.

The numerous decisions of the courts giving these acts extra-territorial effect, would then be of little value, as an injured employee, whenever his contract of employment was in one state where he had accepted a Compensation Act and he was injured in another, might in every such case, if to his advantage, bring a common law action in the state where injured, provided the act of the state of employment differed in any important provision from the act of the state where the injury occurred; but no court has yet so held; see decisions cited above.

The state courts have repeatedly held that because a statute of one state differs in some of its provisions from that of the state of the forum, it does not follow that the courts of the state of the forum would not enforce contracts entered into in the other state and valid under its law, though not in compliance with the lex fori, especially where both statutes were enacted with the same purpose in view.

The Minnesota court in 31 Minn. 11, which is quoted with approval by the United States Supreme Court in Northern Pac. v. Babcock, 154 U. S. 190, says: "It by no means follows that because the statute of one state differs from the law of another state, therefore it would be held contrary to the policy of the latter state. Every day our courts are enforcing rights under contracts where the lex loci con- [fol. 873] tractus and the lex fori are altogether different, and yet we construe these contracts and enforce rights under them according to their force and effect under the laws of the state where made. To justify a court in refusing to enforce a right of action which accrued under the law of another state because against the policy of our laws, it must appear that it is against good morals or natural justice, or that for some other such reason the enforcement of it would be prejudicial to the general interests of our own citizens."

To the same effect is Chicago & E. I. R. Co. v. Rouse, 178 Ill. 132; Stewart v. Balt. & Ohio R. R., 168 U. S. 445; Heggins v. Central N. E. & W. R. Co., 155 Mass. 176; Morris v. Chicago, R. I. & P. R. Co., 65 Ia. 727.

The New York court in Leonard v. Columbia Steam Nav. Co., 84 N. Y. 48, in enforcing a contract entered into in an-

other state, held: "The rule here laid down is just and reasonable, and it is not essential that the statutes should be precisely the same as that of the state where the action is given by law or where it is brought, but merely requires that it should be similar in import and character."

A case analogous to, if not on all fours, with the instant case is that of Barnhart v. Am. Concrete Steel Co., 227 N. Y. 531, where the parties were residents of New Jersey and assented to its Act, but the deceased was killed in the course of his employment in New York and sought to recover in a common law action in that state under the statutes of which it was provided that the right to recover damages for death should never be abrogated. The New York court held there was no recovery and that the New Jersey compensation act, though optional and differing from its own and providing for a contractual compensation in case of death, was not against the public policy of New York. Also see Schweitzer v. Hamburg-American Line, supra; Ora Scott v. White Eagle Oil & Ref. Co., decided in Federal District Court of Kansas, February 3, 1930.

Nor is it clear that the part of the New Hampshire Act as to acceptance was intended to be mandatory, and if held [fol. 374] to be for the benefit of the employee, could not be waived by the employee and employer, and that an agreement to accept prior to the injury would not be enforced. Mulhall v. Nashua Mfg. Co., supra; Kelsea v. Ins. Co., 78 N. H. 422, 425.

It has been suggested that it has been held in two jurisdictions that when compensation allowed in one state was not sufficient, additional compensation might be recovered in another state, citing Farr v. Babcock Lumber Co., 182 N. Car. 725, and Rorvik v. Northern Pac. Lumber Co., 99 Or. 58. But on careful examination of the facts it will be found that the first, if it has any application, is contra; and the second was for the recovery of damages for injuries caused by a third party other than the employer; and provision is usually made in Compensation Acts whereby, if the injury was due to the negligence of a third party, the employer, having paid compensation under the Act, is subrogated to the rights of the employee against the third party, and if an employer fails to sue, the employee may.

We are of the opinion that there is nothing in the contract entered into between these parties in Vermont that is contrary to the main purpose of the New Hampshire Act, or inimical to the welfare of its citizens, and according to the trend of recent decisions in other jurisdictions, the contract of hire under the Vermont Act, upon the principles of comity, constitutes a good defense to an action under the New Hampshire death statute, there having been no contract of hire in New Hampshire.

The judgment of the District Court is vacated, the verdict is set aside and the case is remanded to that court for further proceedings not inconsistent with this opinion; the appellant recovers costs of appeal.

In United States Circuit Court of Appeals

Dissenting Opinion

Anderson, J. (dissenting):

The gist of the opinion is that a contract made in Vermont bars the action for negligence in New Hampshire. This amounts to saying that a Vermont contract may change the public policy of New Hampshire. New Hampshire is a sovereign State. Except as limited by the Fed- [fols. 375 & 376] eral Constitution; Knickerbocker Ice Co. v. Stewart, 253 U. S. 149 and cases cited; its public policy is completely within the control of its own legislature and its own courts. No other State can change it—either directly, or indirectly by implying contracts. In New Hampshire, at common law, contracts relieving employers from liability for future negligence are void. Piper v. Railroad, 75 N. H. 228. This is the universal rule.

The New Hampshire Comp. Act (P. L. c. 178, ss. 11, 12) reasserts the common law rule. The legislature has thus clearly and recently indicated its adherence to the common law rule as to contracts against negligence. The public policy of New Hampshire is not subject to determination by this court "in the light of the decisions of other jurisdictions." Plaintiff's rights rest solely under the law of New Hampshire, where the accident occurred and the suit was brought. This court has no right to change that law.

The ruling now made is equivalent to assuming legislative power in New Hampshire. New York Central R. R. v. Chisholm, 268 U. S. 29, 31, 32; Union Trust Co. v. Grossman, 245 U. S. 412, and authorities cited; Dicey Conflict of Laws, Notes of American Cases, page 669, and cases cited; 3 Williston Contracts, sec. 1792.

[fol. 377] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT, OCTOBER TERM, 1930.

No. 2465.

BRADFORD ELECTRIC LIGHT COMPANY, INC., Defendant, Appellant,

v.

JENNIE M. CLAPPER, Administratrix, Plaintiff, Appellee

Appeal from the District Court of the United States for the District of New Hampshire

Before Bingham, Anderson, and Wilson, JJ.

OPINION OF THE COURT ON REHEARING—June 29, 1931

ANDERSON, J.:

On rehearing, the attention of the court is sharply directed to the fact that the defendant expressly accepted the New Hampshire Workman's Compensation Act,—P. L. N. H. c. 178. This Act reserves, in section 11, to the employee or his legal representative, an action at law for damages or death caused by negligence. It is clear that this Act applies to actions for negligence occurring in New Hampshire, and that its acceptance binds the defendant in this action of tort. We are also satisfied that we were in error in our previous holding; and that no contract made in Vermont purporting to release an employer from liability for future negligence can bar an action brought in New Hampshire for an injury there sustained, and thus [fol. 378] change the public policy of New Hampshire. See Saloshin, Adm'x, v. Houle (N. H.) decided May 5, 1931. It

follows that on both grounds the former decision of this court must be reversed.

This disposes of the defendant's main reliance.

The other assignments of error call for but brief discussion. There was evidence tending to show that at the time of his death on July 30, 1926, the decendent, twenty-one years old, had been employed for about two years by the defendant as a lineman; that he had had no technical training in electricity; that in the early summer of 1926 the defendant extended its lines in New Hampshire and made material alterations in the Haverhill sub-station where Clapper was electrocuted; that these changes left that sub-station as the only one of seven in which there was no switch which would "kill" or make the entire station safe for employees to work thereon; that as the result of a thunder-shower on the night of July 30, Clapper went to this sub-station to replace an apparently blown-out fuse; that he threw the old switch, with which he was familar, apparently assuming that he would thus make the station safe for his work; that shortly thereafter he was heard to groan and that his body was found electrocuted; that in order to make that sub-station entirely safe, it was necessary to use a disconnecting switch at Newbury, on the Vermont side.

While the evidence was somewhat conflicting, the crucial questions of defendant's negligence in exercising reasonable care to provide a sufficient disconnecting switch at the Haverhill substation, and/or to give to the decedent adequate warning of the danger of reliance on the old switch, were plainly questions of fact for the jury.

The charge to the jury was accurate and adequate. The defendant pleaded the decedent's contributory negligence and assumption of risk as affirmative defenses; on elementary principles, the burden was on it to sustain these pleas. Lake Shore, etc., Ry. v. Felton, 103 Fed. 227, 230; McCoy v. Rhodes, 11 How. 131, 136; Jefferson Hotel Co. v. Warren, 128 Fed. 565, 567; Inland, etc., Co. v. Tolson, 139 U. S. 551, 557-558. Compare also Kanawha Co. v. Kerse, 239 U. S. 576, 580 et seq.; Severn v. Philadelphia Co., 281 Fed. 784, 786. Jacobs v. Southern Ry. Co., 241 U. S. [fol. 379] 229, 235; Seaboard Air Line v. Horton, 233 U. S. 492, 503; 45 U. S. C. A. § 54 and cases cited. See also B. & O. R. R. v. Baugh, 149 U. S. 368; McPeck v. Cen. Ver-

mont R. R., 79 Fed. 590, and cases cited; Hawkins v. Bleakley, 220 Fed. 378, 381.

Finding no prejudicial error, the judgment below must be affirmed.

The judgment of the District Court is affirmed with interest and costs.

In United States Circuit Court of Appeals

Dissenting Opinion

Wilson, J. (dissenting):

I cannot agree to the majority opinion that a Vermont contract of employment, both parties to which were domiciled in Vermont and accepted its Workmen's Compensation Act, will not be recognized as valid by this court, because it is against the public policy of New Hampshire where an injury occurred, on the ground that it undertakes to relieve an employer from liability for future negligence. The case is one of new impression and, owing to the peculiar nature of the New Hampshire Employers' Liability and Compensation Act, is unique in the issues it presents, and of importance to employers, especially in adjoining states, otherwise I should not deem it necessary to present my views at length.

The only doubtful question, as I view the case, is the issue presented by the fact that the defendant had also accepted the New Hampshire Compensation Act, Chap. 178, R. S., and complied with Sec. 4. It is not really contended, however, that this was done because of the fact that some of its workmen living and employed in Vermont were also sent into New Hampshire to do service work, as it also appears that by reason of the extension of its lines into New Hampshire it was at times, if not continually, obliged to employ residents of that state.

Unless the fact that the defendant invoked and defended under the New Hampshire Employers' Liability and Compensation Act, after the trial judge ruled that the Vermont contract would not be recognized in New Hampshire, must be construed as an assent that the New Hampshire statutes should alone govern the rights of the plaintiff's [fol. 380] intestate in this case, the parties stand as though

the Employers' Liability and Compensation Act of New Hampshire did not exist. The plaintiff brings its action under New Hampshire's Lord Campbell Act, and the defendant retains all its defenses at common law.

There was no new employment in New Hampshire of the deceased. There was no acceptance of the New Hampshire Act by the deceased or his representative. By commencing an action under New Hampshire's death statute, his administratrix is by Sec. 12 of its Compensation Act expressly barred from all benefits under the Act.

If the defendant, by accepting the Act, assented to the deceased, under the circumstances of this case, taking advantage of any benefits of compensation the Act gives, did not the representative of the deceased, by rejecting it and bringing her action under another statute consent to be subject to all defenses the Act gives the defendant, and also to any defense the defendant had under the principles of comity?

The acceptance of the Compensation Act of New Hampshire does not confer on an employee injured in that state the right to sue at common law or on his representative in case of death to bring an action under its death statute; it merely does not take it away, unless it is voluntarily surrendered up by the acceptance of the Act after the injury. As the plaintiff saw fit to institute a suit under another New Hampshire statute, the acceptance of the New Hampshire Compensation Act by the defendant should not be construed as a waiver of any legitimate defense to the suit the defendant might have under the established rules of comity by virtue of a valid contract it had with the deceased.

However, I desire particularly to go on record as opposed to the ruling of the majority opinion that New Hampshire will not recognize a contract of employment under a Workmen's Compensation Act of another state that requires the assent of the workman before an injury to entitle him to its benefits, on the ground that it is contrary to the public policy of New Hampshire. The New Hampshire court has never so declared, and we cannot conceive of any court [fol. 381] holding that a statute so generally held to be conceived in the interest of the workingman was inconsistent with the welfare of the citizens of New Hampshire. See Mulhall v. Mfg. Co., 80 N. H. 194.

The case of Saloshin, Adm'x, v. Houle, recently decided by the New Hampshire Supreme Court, does not so hold. That was a case where the injury occurred through the negligence of a third party in New Hampshire, and the deceased, a resident of New York, had accepted the New York Compensation Act and his representative and widow was receiving compensation under it. She brought an action against the third party in New Hampshire.

By the provisions of the New York Act, however, the claim of an employee against a third party, in case he accepts compensation, is assigned to the insurer, or the party paying the compensation. The insurer asked to be joined in the action in New Hampshire. There seems to have been some question as to whether the decedent had received or would receive, if allowed to prosecute the action for her own benefit, damages that might belong to other beneficiaries under the provisions of the New Hampshire death statute. The New Hampshire court merely held that, in an action in New Hampshire, a New York statute that differed from its own did not control as to damages. It is significant, however, so far as it has any bearing on the case now at bar, that the New Hampshire court, upon the principles of comity, did recognize the provision of the New York statute that assigned the employee's rights against the third party to the insurer and held the action was maintainable in the administratrix's name for the benefit of the insured, notwithstanding the right arose under a compensation act of another state, which leaves no option on the part of the employee to reject it after the injury occurred.

Whether a contract similar to that of Vermont would be valid if entered into in New Hampshire under its present statutes is not material, as appears from Smith V. Godfrey, infra, and the cases hereinafter cited. It is conceded that it is a valid contract in Vermont, and by its terms the deceased agreed that his remedy under the Compen- [fol. 382] sation Act of Vermont, in case of injury either in Vermont or New Hampshire, was an exclusive remedy.

It is true that contracts for relief against future negligence in this country are held void as against public policy; but a contract for adequate compensation in case of injury by accident, whether due to negligence of either employer or employee, or occurring without the negligence of either,

is quite different from a contract under which an employee receives no benefit, but relieves the employer from all liability for future negligence. In the one case, it is held to be a contract in the interest of the workman, and in the other, that it is so hostile to his interest and so conducive to neglect on the part of the employer to provide the ordinary provisions of safety for its employees, that it is, so far as we know, upheld by no court in this country.

The Massachusetts court, however, has repeatedly held that a contract exempting one party from liability from future negligence, if valid where made, as in England, though contrary to the public policy of Massachusetts and would be void if made there, is not immoral or illegal and will be enforced in that Commonwealth. Fonseca v. Cunard Steamship Line, 153 Mass. 553, 557; O'Regan v. Cunard Steamship Line, 160 Mass. 356, 361; Stone v. Old Colony St. Railway, 212 Mass. 459, 464; Mittenthal v. Mascagni, 183 Mass. 19. The word "illegal" is evidently here used in the sense of prohibited by express statute.

The limits of the concept, public policy, is not easily defined. Mr. Greenhood in his work on public policy gives this brief summary of the law, which is well supported by the authorities: "When a contract is valid under the public policy of the state where made, it will be enforced in another state, although the same would by the statute laws of the latter state be void, unless its enforcement would exhibit to the citizens of the state an example pernicious and detestable."

Again: "The law of one state having ex proprio vigore no validity in another state, the enforcement of a foreign contract which would not be valid by the law of the forum where its enforcement is judicially attempted, depends]fol. 383] upon comity which is extended for that purpose, unless the agreement is contrary to the public policy of the state of the forum *in that it is contrary to good morals, or the state or its citizens would be injured by its enforcement* or it *perniciously* violates positive written or unwritten prohibitory law." (Italics supplied.)

In other words, every contract, unless held to be contrary to good morals, and the welfare of its citizens, should be enforced in another state than the state of its inception, under the well established principles of comity, even though prohibited by the law of the forum.

This rule is recognized in New Hampshire in Smith v. Godfrey, 28 N. H. 379, the leading New Hampshire case, in which "A sold and delivered spirituous liquors to B in Massachusetts, and such sale was there legal. Upon an action brought for the price in New Hampshire, where such sales are illegal, it was held that the bare knowledge on the part of the vendor that the purchaser intended to sell them in New Hampshire contrary to law, was not a defence to the action and the plaintiff could recover the price." This case was followed in Hill v. Spear, 50 N. H. 253; McDonald v. Railway, 71 N. H. 448, 450.

The court held further in Smith v. Godfrey that, while no state or nation is bound to recognize or enforce any contracts which are injurious to its own interests or to those of its citizens, "It is a well established general principle that the validity of a contract is to be determined by the law of the place where the contract is made."

In Milliken v. Pratt, 125 Mass. 374, 375, the Massachusetts court said: "The general rule is that the validity of a contract is to be determined by the law of the state in which it is made; if it is valid there, it is deemed valid everywhere, and will sustain an action in the courts of a state *whose laws do not permit such a contract.* Scudder v. Union National Bank, 91 U. S. 406. Even a contract expressly prohibited by the statutes of the state in which the suit is brought, *if not in itself immoral,* is not necessarily nor usually deemed so invalid that the comity of the state, as administered by its courts, will refuse to entertain [fol. 384] an action on such a contract made by one of its own citizens abroad in a state, the laws of which permit it. Greenwood v. Curtis, 6 Mass. 358; M'Intyre v. Parks, 3 Met. 207." (Italics supplied.)

In O'Regan v. Cunard Steamship Line, supra, the same court said: "Although the stipulation relieving the defendant from liability for injuries resulting from negligence of its servants is against the policy of our law, it is not immoral or illegal, and it being valid in Great Britain where it was made, it will be enforced on principles of comity in our courts."

The mere fact that statutes of different states, of the same general character, differ in some feature, does not render a contract entered into in one state and valid under its statute, unenforcible in another state because it does

not conform to its statute. Swann v. Swann, 21 Fed. 299, 306; Reynolds v. Day, 79 Wash. 499, 502; Herrick v. Minneapolis & St. L. R. Co., 31 Minn. 11; Northern Pac. v. Babcock, 154 U. S. 190; Chicago & E. I. R. Co. v. Bouse, 178 Ill. 132; Higgins v. Central N. E. & W. R. Co., 155 Mass. 176, 180; Dennick v. R. R. Co., 103 U. S. 11; Barnhart v. Am. Concrete Steel Co., 227 N. Y., 531; Schweitzer v. Hamburg-American Line, 138 N. Y. S. 944; Howard v. Howard, N. Car. Sup. Ct. decided April 1st, 1931; Bliss v. Houghton, 16 N. H. 90, 91, 92; Adams v. Gay, 19 Vt. 358, 367; 2 Kent, 117, 118.

The cases cited by counsel for appellee of Am. Mut. Liability Co. v. McCraffrey et al., 37 Fed. (2d) 870; Johns-Manville, Inc., v. Thrane, 80 Ind. App. 432, and Carl Hagenback & Wallace Show Co. v. Randall, 75 Ind. App. 417, have no bearing on this case. In the first two the employee was employed solely to do work in the state where the accident occurred, and it was held that he was subject to the Compensation Law of that state. In the last case the appellant was an Indiana corporation. The appellee was employed to work in any state. He made a contract in Ohio by which he agreed that if injured his rights were to be controlled by the laws of the District of Columbia. At the time of his injury he was being employed in Indiana, the domicile and place of business of the appellant, and the rights of the parties under these conditions were held to be governed by the law of Indiana.

[fol. 385] Here the deceased was employed to work in Vermont where the domicile and main business of his company was, and incidentally in New Hampshire. In such case the rule has now become generally established to hold the employee subject to the law of the state where his employment was entered into. Pettiti v. Pardy Cons. Co., 103 Conn. 101, 109; Minto v. Hitchings, 198 N. Y. 610; Schweitzer v. Hamburg-American Line, supra; Norman v. Hartman Furniture Co., 84 Ind. App. 173.

I am firmly of the opinion that there is nothing in the contract entered into between these parties in Vermont that is contrary to the purpose of the New Hampshire Compensation Act as defined by the court of that state in Mulhall v. Nashua Mfg. Co., 80 N. H. 194, or inimical to the welfare of its citizens and the public policy of that state; and according to the trend of decisions in other

jurisdictions, the rights of the parties should have been held to be governed by the Vermont contract, which provided for the plaintiff's only and exclusive relief for the death of her intestate.

If the employee or his representative had also accepted the New Hampshire Act and sought to enforce his rights under that Act, the New Hampshire courts, in accordance with the most recent decisions, would have refused to award compensation under the New Hampshire Act and referred her back to Vermont where his contract of employment was made. Pettiti v. Pardy Construction Co., 103 Conn. 101, 109; Minto v. Hitchings, 198 N. Y. S. 610; Schweitzer v. Hamburg-American Line, 138 N. Y. S. 944; Barnhart v. Am. Concrete Steel Co., 227 N. Y. 531; Norman v. Hartman Furniture Co., 84 Ind. App. 173.

Bradbury in the third edition of his work on Compensation Law, page 88, after reviewing the results of the administration of the law for two decades says: "It would seem that the application of the doctrine that the parties should be governed by the Workmen's Compensation Law of the state where the contract of employment was made, would settle very many of the difficulties which are bound to arise, and any other doctrine would multiply these difficulties."

[fol. 386] The recognition of the Vermont contract in this case does not interfere with the sovereign powers of New Hampshire, or extend the laws of Vermont into New Hampshire any more than does the recognition and enforcement in New Hampshire of a contract entered into in another state and valid there, though not valid under the laws of New Hampshire. See Smith v. Godfrey, supra; Mill v. Spear, supra.

Neither does the clause in a majority of the Compensation Acts in the different states expressly giving the law extra-territorial effect project the law of the enacting state into another state in defiance of its laws or its sovereignty. It merely provides that in case of injury in another state, the state where the contract was entered into will allow compensation, though the accident occurred beyond its jurisdiction. In other words the contract for compensation is as broad as the contract of employment.

[fols. 387 & 388] IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER GRANTING LEAVE TO APPLY FOR AMENDMENT OF RECORD —August 13, 1930

Upon motion of appellant leave is granted to apply to the District Court to amend the transcript of record by adding omitted testimony thereto.

By the Court.

Arthur I. Charron, Clerk.

Thereafter, to wit, on September 5, 1930, the supplemental transcript of record (pages 319-359) was filed.

On October 17, 1930, this case came on to be heard, and was fully heard by the court, Honorable George H. Bingham, Honorable George W. Anderson and Honorable Scott Wilson, Circuit Judges, sitting.

Thereafter, to wit, on January 8, 1931, the opinion of the court (page 361) and a dissenting opinion (page 374) were filed and the following Judgment was entered:

IN UNITED STATES CIRCUIT COURT OF APPEALS

JUDGMENT—January 8, 1931

This cause came on to be heard October 17, 1930, upon the transcript of record of the District Court of the United States for the District of New Hampshire, and was argued by counsel:

Upon consideration whereof, It is now, to wit, January 8, 1931, here ordered, adjudged and decreed as follows: The judgment of the District Court is vacated, the verdict is set aside and the case is remanded to that court for further proceedings not inconsistent with the opinion passed down this day; the appellant recovers costs of appeal.

By the Court.

Arthur I. Charron, Clerk.

[fols. 389 & 390] IN UNITED STATES CIRCUIT COURT OF APPEALS

APPELLEE'S PETITION FOR REHEARING—Filed February 7, 1931

Now comes Jennie M. Clapper, Administratrix, plaintiff, appellee, and moves for rehearing, and assigns the following reasons therefor:

I. The decision in the case abrogates the laws of New Hampshire;

II. The defendant having accepted the New Hampshire Compensation Act, and the plaintiff having brought her action according to the provisions of the Act the rights of the parties ought to be determined by the laws of New Hampshire.

Wherefore upon the foregoing grounds the said Jennie M. Clapper, Administratrix, prays that a rehearing may be granted and for such further relief as may be just.

Jennie M. Clapper, Administratrix, by her Attorneys, Joseph C. Donovan, Robert W. Upton.

Certificate of Counsel

The foregoing petition for a rehearing of this case is presented in good faith and not for delay.

Robert W. Upton, Attorney for Jennie M. Clapper, Administratrix.

[fols. 391 & 392] IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER DENYING MOTION FOR SECURITY FOR COSTS—March 6, 1931

It is ordered that appellant's motion for security for costs be, and the same hereby is, denied.

By the Court.

Arthur I. Charron, Clerk.

In United States Circuit Court of Appeals

Order Granting Rehearing—March 6, 1931

It is ordered that appellee's petition for rehearing be, and the same hereby is, granted.

By the Court.

Arthur I. Charron, Clerk.

Thereafter, to wit, on April 14, 1931, this case came on to be heard on reargument, and was fully heard by the court, Honorable George H. Bingham, Honorable George W. Anderson and Honorable Scott Wilson, Circuit Judges, sitting.

Thereafter, to wit, on June 29, 1931, the following Order of Court was entered.

In United States Circuit Court of Appeals

Order Vacating Judgment—June 29, 1931

It is ordered that the judgment entered January 8, 1931, be, and the same hereby is, vacated.

By the Court.

Arthur I. Charron, Clerk.

On the same day, June 29, 1931, the Opinion of the Court on Rehearing (page 377) and a dissenting opinion (page 379) were filed and the following Judgment was entered:

In United States Circuit Court of Appeals

Judgment—June 29, 1931

This cause came on to be heard upon reargument April 14, 1931, upon the transcript of record of the District Court of the United States for the District of New Hampshire, and was reargued by counsel.

[fols. 393 & 394] Upon consideration whereof, it is now, to wit, June 10, 1931, here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed with interest and costs.

By the Court.

Arthur I. Charron, Clerk.

Thereafter, to wit, on August 3, 1931, upon motion by appellant mandate was stayed until further order of court.

Clerk's certificate to foregoing transcript omitted in printing.

[fols. 395 & 396] IN UNITED STATES CIRCUIT COURT OF APPEALS

PETITION FOR APPEAL—Filed September 12, 1931

To the Honorable George H. Bingham, Chief Justice, or to any Associate Justice, of the Circuit Court of Appeals for the First Circuit:

Your petitioner, the Bradford Electric Light Company, Inc., appellant in the above entitled cause, complains of the judgment of the Circuit Court of Appeals for the First Circuit in the above entitled cause, entered on the 29th day of June, 1931, affirming the judgment of the United States District Court for the First District of New Hampshire, and shows that there was drawn in question in said case in said Circuit Court of Appeals the validity of sections 5763, 5765, 5770, 5774, and 5762 of the General Laws of Vermont relating to labor, c. 241, of said State of Vermont, on the ground of said statute being repugnant to the Constitution of the United States, and the decision of said Circuit Court of Appeals is against the validity of said above cited statutes in that the Circuit Court of Appeals failed to give full faith and credit to said General Laws of Vermont, contrary to the provisions of Article IV, s. 1, of the Constitution of the United States because said provisions of the General Laws of said State of Vermont became a part of the contract of employment entered into between the employer, Bradford Electric Light Company, Inc., and the employee, Leon J. Clapper, and under the provisions of said statute the rights, remedies and liabilities of the parties to said agreement are governed solely and exclusively by the provisions thereof, and constitute a bar to the maintenance of a common law action under the Employers' Liability Act in New Hampshire to recover damages for injuries resulting in the

death of said employee while in the employ of said employer.

Wherefore, your petitioner, the Bradford Electric Light Company, Inc., prays for the allowance of an appeal to the [fols. 397 & 398] Supreme Court of the United States and for a supersedeas of judgment, with a direction as to the amount of the bond to be filed to act as said supersedeas.

Dated September 12, 1931.

Bradford Electric Light Company, Inc., by George T. Hughes, Stanley M. Burns, Counsel for Petitioner.

IN UNITED STATES CIRCUIT COURT OF APPEALS

APPELLANT'S ASSIGNMENT OF ERRORS—Filed September 12, 1931

Now comes the Bradford Electric Light Company, Inc., appellant in the above entitled action, and files the following assignment of errors upon which it will rely, and says that the Court erred in the following particulars:

(1) The rulings of law made by the Court in its opinion under date of June 29, 1931, are contrary to the provisions of the Constitution of the United States, Article IV, s. 1, in that the Court failed to give full faith and credit to the Public Laws of Vermont relating to labor, c. 241, ss. 5763, 5765, 5770, 5774, and 5762, in the State of Vermont, known as the Workmen's Compensation Act, which by its terms became a part of the contract of employment entered into between the Bradford Electric Light Company, Inc., employer, and Leon J. Clapper, employee, and under the terms and provisions of said Act the rights, remedies and liabilities of the parties were governed solely and exclusively by the provisions thereof, which Act constituted a bar to the maintenance of a common law action by the employee against the employer for injuries sustained while in the course of his employment.

(2) The rulings of law made by the Court in its opinion under date of June 29, 1931, are contrary to the provisions of the Constitution of the United States, Article IV, s. 1, [fols. 399 & 400] in that the Court by its opinion failed to

recognize and enforce a valid contract entered into in the State of Vermont between the employer and employee, which, by its terms, barred the employee from maintaining a common law action against his employer to recover damages for personal injuries sustained while in the course of his employment.

(3) The rulings of law made by the Court in its opinion under date of June 29, 1931, are contrary to the provisions of the Constitution of the United States, Article IV, s. 1. in that the Court held that the acceptance in New Hampshire by the Bradford Electric Light Company, Inc., of the Workmen's Compensation Act, Public Laws of New Hampshire, 1926, c. 178, was binding upon the parties in the case at bar to the exclusion of the rights of the parties under the provisions of the Vermont Workmen's Compensation Act.

(4) The rulings of law made by the Court in its opinion under date of June 29, 1931, are erroneous in that the Court held that the contract of employment entered into in Vermont between the employer and employee was a contract which purported to release an employer from liability for future negligence.

(5) The rulings of law made by the Court in its opinion under date of June 29, 1931, are erroneous in that the Court held that the contract of employment entered into in Vermont between the employer and employee was contrary to the public policy of New Hampshire.

(6) The rulings of law made by the Court in its opinion under date of June 29, 1931, are erroneous in that the Court held that the contract of employment entered into in Vermont between the employer and employee was not a bar to the maintenance of a common law action in New Hampshire.

(7) The rulings of law made by the Court in its opinion under date of June 29, 1931, are erroneous in that the Court held that the acceptance in New Hampshire by the Brad- [fols. 401 & 402] ford Electric Light Company, Inc., of the Workmen's Compensation Act, Public Laws of New Hampshire, 1926, c. 178, was binding upon the parties in the case at bar to the exclusion of the rights of the parties under the provisions of the Vermont Workmen's Compensation Act.

(8) The rulings of law made by the Court in its opinion under date of June 29, 1931, are erroneous in that the Court held that when the appellant invoked and defended under the Workmen's Compensation Act of New Hampshire, it then assented that the New Hampshire statutes should alone govern the rights of appellee's intestate in the case.

Wherefore, said Bradford Electric Light Company, Inc., appellant, prays that the foregoing assignment of errors may be allowed.

Bradford Electric Light Company, Inc., by George T. Hughes, Stanley M. Burns, Counsel for Petitioner.

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER ALLOWING APPEAL WITH SUPERSEDEAS—Filed September 12, 1931

The petition of the Bradford Electric Light Company, Inc., appellant in the above entitled cause, for an appeal from the final judgment of the Circuit Court of Appeals for the First Circuit, rendered under date of June 29, 1931, is hereby granted, and the appeal is allowed; and upon petitioner filing a bond in the sum of Five Thousand Dollars, ($5,000.00), with sufficient sureties, and conditioned as required by law, the same shall operate as a supersedeas of the judgment made and entered in the above cause, and shall suspend and stay all further proceedings in this Court until the termination of said appeal by the United States Supreme Court.

Dated September 12, 1931.

George H. Bingham, Senior Circuit Judge for the First Circuit.

[fols. 403 & 404] IN UNITED STATES CIRCUIT COURT OF APPEALS

WAIVER OF BOND ON APPEAL—Filed September 12, 1931

In the above entitled action, the appellee, Jennie M. Clapper, Administratrix, hereby waives the filing of a bond by

the Bradford Electric Light Company, Inc., on the transfer of said action to the United States Supreme Court.

Jennie M. Clapper, Administratrix, by Robert W. Upton, Attorney for Appellee.

[fols. 405 & 406] Citation, in usual form, showing service on Robert W. Upton, omitted in printing.

[fol. 407] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 408] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 7, 1931

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 409] SUPREME COURT OF THE UNITED STATES

STIPULATION AS TO PRINTING OF RECORD—Filed Jan. 11, 1932

It is hereby stipulated between the appellant, by its attorneys, and the appellee, by her attorneys, that in printing the record in the above entitled cause, the Clerk shall print the following documents and papers.

(References are to the official record).

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CHARLES ELMORE

Supreme Court of the United States.

OCTOBER TERM, 1931.

No. 423

BRADFORD ELECTRIC LIGHT COMPANY, INC.,

Petitioner and Appellant Below

v.

JENNIE M. CLAPPER, ADMINISTRATRIX,

Respondent and Appellee Below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

By WILLIAM E. LEAHY,
GEORGE T. HUGHES,
STANLEY M. BURNS,

Counsel for Petitioner.

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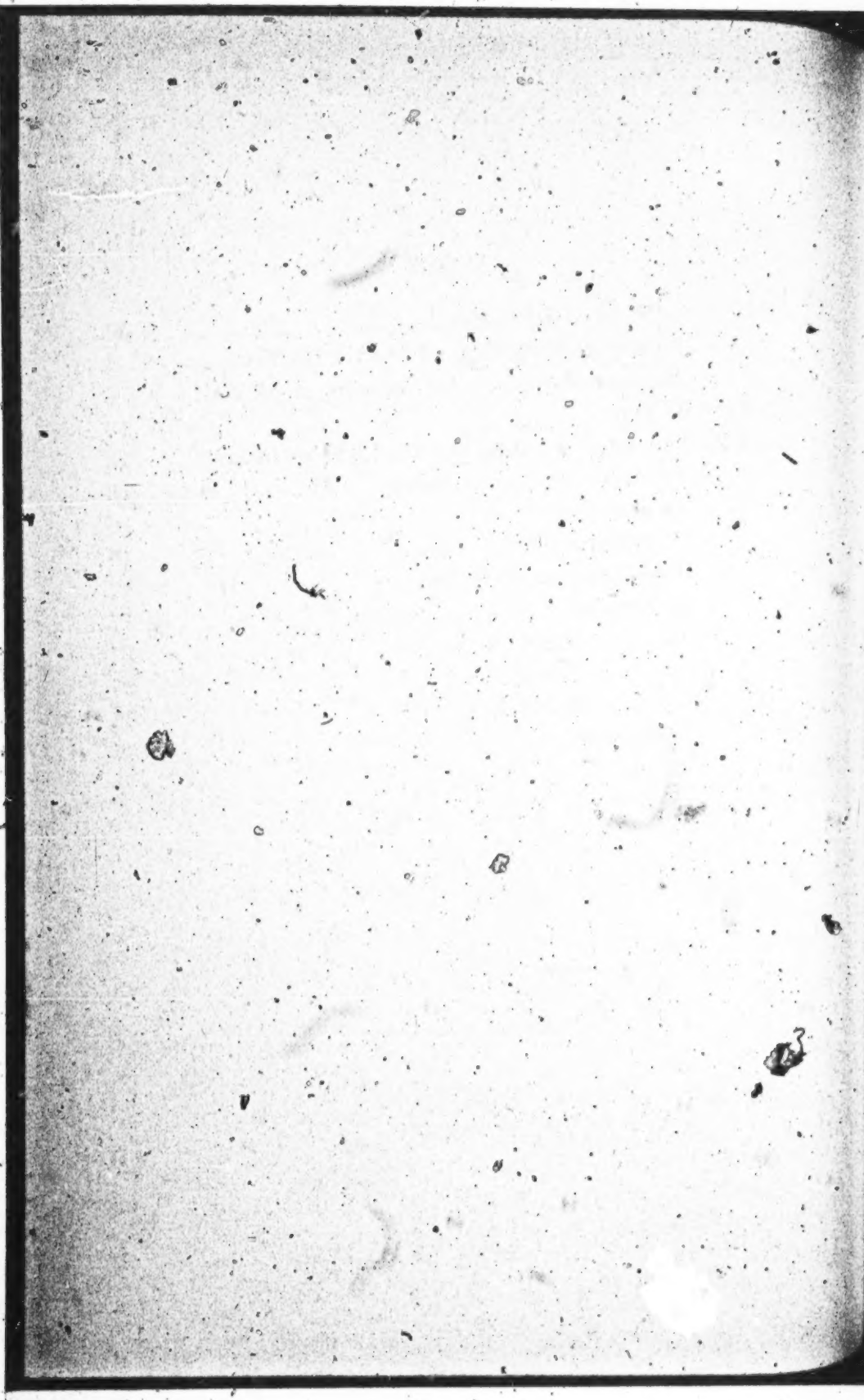

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Supreme Court of the United States.

OCTOBER TERM, 1931.

No.

BRADFORD ELECTRIC LIGHT COMPANY, INC.,

Petitioner and Appellant Below

v.

JENNIE M. CLAPPER, ADMINISTRATRIX,

Respondent and Appellee Below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully represents:

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

(1) Your petitioner, the Bradford Electric Light Company, Inc., is a corporation duly established under the laws of the State of Vermont, with a principal place of business at Bradford in said State of Vermont, and is a resident and citizen of said State.

(2) That the respondent, Jennie M. Clapper, is administratrix of the Estate of Leon J. Clapper, late a resident of said Bradford, and at the time of his death was employed by said Bradford Electric Company in said State of Vermont to work within and without said State.

(3) That said Bradford Electric Light Company, Inc., is a public utility, and is engaged in the manufacture of electric energy in said State of Vermont, which is distributed through its transmission lines in said State of Vermont and across the Connecticut River serving various towns in the adjoining state of New Hampshire.

(4) That the said Leon J. Clapper while in the course of his employment sustained injuries resulting in his death in Haverhill, N. H., on July 30, 1926.

(5) That on said date, to wit, July 30, 1926, the said Bradford Electric Light Company, Inc., had accepted the provisions of the Workmen's Compensation Act of the State of Vermont, as more particularly set forth in the General Laws of the State of Vermont relating to labor, Chapter 241.

(6) That the said Leon J. Clapper had accepted the provisions of the Workmen's Compensation Act of said State of Vermont, and at the time of his death the rights, remedies and liabilities of the parties were governed and controlled exclusively by the provisions of said Act.

(7) That the provisions of said Act were extra-territorial and applied to injuries received by employees even though such injury was received outside of the State of Vermont.

(8) That Jennie M. Clapper of Manchester, County of Hillsborough, State of New Hampshire, was appointed administratrix of the Estate of her brother, Leon J. Clapper, and on September 16, 1927, instituted an action in the Superior Court for the County of Hillsborough, State of New Hampshire, against said Bradford Electric Light Company, Inc., at common law, to recover damages in the sum of $10,000 for the death of said Leon J. Clapper due to alleged negligence on the part of said Bradford Electric Light Company, Inc.

(9) That said Bradford Electric Light Company, Inc., removed said cause of action to the District Court of the United States for the First District on the ground of diversity of citizenship between the parties thereto, the said

Jennie M. Clapper being a resident and citizen of New Hampshire, and the said Bradford Electric Light Company, Inc., being a resident and citizen of said State of Vermont.

(10) After said action had been removed to the District Court of the United States for the First District, the said Bradford Electric Light Company, Inc., filed an answer denying liability on its part, and pleaded the Workmen's Compensation Act of the State of Vermont as a bar to the maintenance of said common law action in New Hampshire, and moved to dismiss same, said motion being as follows (Record, p. 21):

> "Now comes the defendant in the above entitled action, and defends and says that it is not guilty in manner and form as alleged by the plaintiff in her writ and declaration, and this it is ready to verify.
>
> And further answering, the defendant says
>
> 1. That it is a corporation duly established under the laws of the State of Vermont and having a principal place of business at Bradford in said State of Vermont.
>
> 2. That Leon J. Clapper at the time of his death and for some time prior thereto was a resident of said Bradford, Vt.
>
> 3. That said Bradford Electric Light Company, Inc., hired the said Leon J. Clapper in the State of Vermont to work within and outside of said State.
>
> 4. That the said Leon J. Clapper while in the employ of said defendant was killed at Haverhill in the County of Grafton and State of New Hampshire on July 30, 1926.
>
> 5. That the defendant has accepted the provisions of the Workmen's Compensation Act for the State of Vermont.
>
> 6. That the *General Laws of the State of Vermont* relating to Labor, Chapter 241, Section 5763, provide as follows:
>
> **'ELECTION OF EMPLOYER OR EMPLOYEE.**
>
> **The provisions of this chapter, except sections five thousand seven hundred and sixty-six, five thousand seven hundred and sixty-seven and five thousand eight hundred and twenty-six, shall not apply to an employer or employee unless prior to the injury they shall have so elected by agreement, either express or implied, as hereinafter provided. Such agreement**

shall be a surrender by the parties thereto of their rights to any other method, form or amount of compensation or determination thereof than as provided in this chapter, and shall bind the employee himself, his widow, the employee's widower, personal representative, and next of kin and dependents as hereinafter defined, as well as the employer and those conducting his business during bankruptcy or insolvency.'

7. That the *General Laws of the State of Vermont* relating to Labor, Chapter 241, Section 5765, provide as follows:

'SAME: AS TO CONTRACTS MADE SUBSEQUENT TO JULY FIRST, NINETEEN HUNDRED AND FIFTEEN. Every contract of hiring, verbal, written or implied, made subsequent to July first, nineteen hundred and fifteen, shall be presumed to have been made subject to the provisions of this chapter, unless there is, as a part of such contract, an express statement in writing prior to accident, either in the contract itself or by written notice by either party to the other and to said commissioner, that the provisions of this chapter, other than sections five thousand seven hundred and sixty-six, five thousand seven hundred and sixty-seven and five thousand eight hundred and twenty-six, are not intended to apply, and it shall be presumed that the parties have elected to be subject to the provisions of this chapter and to be bound thereby. In the employment of minors, this chapter shall be presumed to apply unless the notice is given by or to the parent or guardian of the minor. The agreement for the operation of the provisions of this chapter, other than sections five thousand seven hundred and sixty-six, five thousand seven hundred and sixty-seven and five thousand eight hundred and twenty-six, may be terminated by either party upon sixty days' notice to the other and to said commissioner, in writing prior to any accident.'

8. That the *General Laws of the State of Vermont* relating to Labor, Chapter 241, Section 5770, provide as follows:

'INJURIES OUTSIDE OF STATE. If a workman

who has been hired in this state receives personal injury by accident arising out of and in the course of such employment, he shall be entitled to compensation according to the law of this state, even though such injury was received outside of this state.'

9. That the *General Laws of the State of Vermont* relating to Labor, Chapter 241, Section 5774, provide as follows:

'RIGHT TO COMPENSATION EXCLUSIVE: The rights and remedies granted by the provisions of this chapter to an employee on account of a personal injury for which he is entitled to compensation under the provisions of this chapter, shall exclude all other rights and remedies of such employee, his personal representatives, dependents or next of kin, at common law or otherwise on account of such injury. Employers who hire workmen within this state to work outside of the state, may agree with such workmen that the remedies under the provisions of this chapter shall be exclusive as regards injuries received outside this state by accident arising out of and in the course of such employment, and all contracts of hiring in this state shall be presumed to include such an agreement.'

10. That the *General Laws of the State of Vermont* relating to Labor, Chapter 241, Section 5762, provide as follows:

'GENERAL POWERS OF COMMISSIONER. Questions arising under the provisions of this chapter, if not settled by agreement of the parties interested therein with the approval of said commissioner, shall, except as otherwise provided, be determined by said commissioner. The decisions of said commissioner shall be enforceable by the county court under the provisions of section five thousand eight hundred and nine. From such a decision an appeal shall lie in the same manner as other appeals from said commissioner; but in no case shall such an appeal operate as a supersedeas or stay unless said commissioner or the court to which such appeal is taken shall so order.'

11. That the said Leon J. Clapper was subject to the

provisions of the Workmen's Compensation Act of said State of Vermont as he had not filed with his employer or with the Commissioner of said State of Vermont, before the injury complained of, a declaration electing not to accept the provisions of the Workmen's Compensation Act of said State of Vermont as provided by said Act, and as further provided by said Act was presumed to have been operating under the contract of employment as defined by the Compensation Act.

12. That to permit the said plaintiff to maintain her common law action would be

(a) Contrary to the laws of the State of Vermont, the said Leon J. Clapper having at the time of his death accepted the provisions of the Workmen's Compensation Act for said State,

(b) A breach of his agreement with said Bradford Electric Light Company, Inc., to accept compensation under the provisions of the Workmen's Compensation Act, and

(c) Would work a great hardship, and perpetrate a fraud on said Bradford Electric Light Company, Inc.

13. That the acceptance of the provisions of the Workmen's Compensation Act for said State of Vermont by the said Leon J. Clapper, as above specifically set forth, is a bar to the plaintiff's present common law action.

14. That this Court has no jurisdiction over the parties to, or the subject matter of, said suit.

WHEREFORE, said defendant prays that the Court dismiss the plaintiff's common law action, and for such other and further relief as may be just."

(11) After the defendant had filed its answer and motion to dismiss, the plaintiff moved to reject defendant's answer and brief statement, which motion was as follows (Record, p. 25):

"Now comes the plaintiff and moves that the brief statement of defense submitted by the defendant under the plea of the general issue be rejected for the following reasons:

(1) That the Workmen's Compensation Law of Vermont has no extra-territorial force or effect and does not control the rights of the parties in this litigation.

(2) That the rights of the parties to this action are determinable solely by the laws of the State of New Hampshire.

(3) That the plaintiff's cause of action accrued under and

by virtue of the Laws of New Hampshire, the injury causing the death of the plaintiff's intestate, occurring while he was employed within said State.

(4) That the matters set forth in the defendant's brief statement do not constitute a valid and legal defense to the plaintiff's cause of action."

(12) After the filing of the foregoing motion the matter came on for a hearing before the presiding justice, and the following rescript was filed (Record, p. 26):

"This matter came on for hearing upon plaintiff's motion to reject the defendant's answer filed under the general issue.

Upon hearing the parties it appears that the special matter pleaded, which is really a plea to the jurisdiction to the Court, must be overruled and the case set for trial on its merits.

Actions under the Employers' Liability Act in New Hampshire are based on tort not on contract and the law of Vermont has no extra-territorial effect.

It is alleged that the deceased, Leon J. Clapper, accepted the provisions of the Workmen's Compensation Act for the State of Vermont, but it appears from the pleadings and the argument of counsel the only acceptance upon which the defendant relies is the failure of the deceased to file a declaration electing not to accept the provisions of the Act.

Defendant's motion to dismiss is denied."

(13) After the presiding justice of the District Court had dismissed defendant's motion and ordered it to proceed by trial by jury under the provisions of the New Hampshire law, the case was tried three times by jury, the first trial resulting in a disagreement, the second trial resulting in a verdict for plaintiff for $850, which was set aside, and the third trial resulting in a verdict for plaintiff in the sum of $4,000, and judgment was entered for this amount in favor of plaintiff and against defendant by order of the Court on December 9, 1929.

(14) As stated supra, a part of petitioner's distribution system extended into New Hampshire, where it maintained and operated substations and other equipment used in connection with the operation of its plant, and engaged em-

ployees who were residents of New Hampshire to work upon its lines within the State of New Hampshire.

(15) In the defense of the common law action instituted by the respondent, the Court having ruled that the case at bar was governed by the Employer's Liability Act of New Hampshire, and the Vermont law did not apply, and it appearing that the petitioner had engaged New Hampshire employees to work in New Hampshire upon that type of hazardous employment which came within the definition of the statute (N. H. Public Laws, 1926, c. 178, s. 1), it was incumbent upon the petitioner in order to avail itself of the defenses of assumption of risk and negligence of a fellow servant (Public Laws, c. 178, ss. 2, 3, 4), to prove that it had accepted the provisions of the New Hampshire Workmen's Compensation Act and that same were in force on the date of the accident. *Spilene* v. *Co.*, 79 N. H. 326.

(16) Accordingly, and as a part of petitioner's case, by reason of the Court's ruling before any evidence was introduced, the petitioner offered to prove that it had accepted the provisions of the New Hampshire Compensation Act, and that same were in effect on the date of the accident, but the respondent admitted the facts to be as stated in the offer of proof, and further proof became unnecessary (Record, p. 203).

(17) After the judgment had been entered in the District Court in favor of respondent and against the petitioner in the sum of $4,000, the petitioner seasonably filed a bill of exceptions, and the case was transferred to the Circuit Court of Appeals for the First Circuit.

(18) Thereafter the case was briefed and argued orally before Justices Bingham, Anderson and Wilson of the Circuit Court of Appeals for the First Circuit by counsel for the respective parties, and on January 8, 1931, by an opinion written by Judge Wilson, in which Judge Bingham concurred, the judgment of the District Court was vacated, the verdict set aside, and the case remanded to that court for

further proceedings not inconsistent with the opinion (Record, p. 361).

(19) Judge Anderson handed down a dissenting opinion (Record, p. 374).

(20) Thereafter counsel for the respondent seasonably filed a motion for a rehearing, and the case was again briefed and argued orally before the same Justices of the Circuit Court of Appeals for the First Circuit (Record, p. 389).

(21) On June 29, 1931, by an opinion written by Judge Anderson, in which Judge Bingham concurred, the majority opinion of the Circuit Court of Appeals handed down under date of January 8, 1931, was reversed, and the judgment of the District Court in favor of respondent was affirmed, with interest and costs (Record, p. 377).

(22) Judge Wilson wrote a dissenting opinion (Record, p. 379).

II.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

(1) The decision of said Circuit Court of Appeals as to the contract of employment entered into between the petitioner and respondent's intestate in the State of Vermont being a contract purporting to release an employer from liability for future negligence which could not be enforced in New Hampshire as contrary to the public policy of this state, is in conflict with the decision of the Circuit Court of Appeals for the Federal District of Kansas on the same matter in the case of *Ora Scott* v. *White Eagle Oil and Refining Company,* decided February 3, 1930.

(2) The Circuit Court of Appeals refused to apply the decisions of State and Federal Courts of last resort, and rendered a decision upon an important question of general law which is untenable and in conflict with the great weight of authorities.

(3) The particular decisions referred to are

Barnhart v. *Am. Concrete Steel Co.*, 227 N. Y. 531.
Martin v. *Kennecott Copper Corp.*, 252 Fed. 207.
Johnston v. *Kennecott Copper Corp.*, 248 Fed. 407.
Ora Scott v. *White Eagle Oil & Refining Co.*, Federal District Court of Kansas, decided Feb. 3, 1930.
Mulhall v. *Nashua Mfg. Co.*, 80 N. H. 194.
Northern Pacific v. *Babcock*, 154 U. S. 190.

(4) That the case at bar "is one of new impressions, and owing to the peculiar nature of the New Hampshire Employers' Liability & Compensation Act is unique in the issues it presents, and of importance to employers, especially in adjoining states". (Circuit Judge Wilson's dissenting opinion, Record, p. 379).

(5) The Circuit Court of Appeals, contrary to the provisions of Article IV, s. 1, of the Constitution of the United States, failed to give full faith and credit to the General Laws of Vermont relating to Labor, Chapt. 241, ss. 5763, 5765, 5770, 5774 and 5762 in the State of Vermont, which laws by agreement of the parties became a part of the contract of employment entered into between the employer and the employee, and each was bound by the exclusive rights and remedies thereunder.

Pollard v. *Bailey*, 20 Wall. 520, 527.
Galveston Ry. v. *Wallace*, 223 U. S. 481, 490.
Stewart v. *B. & O. R. R.*, 168 U. S. 445.
National Bank v. *Franklyn*, 120 U. S. 747, 753.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this Court directed to the Circuit Court of Appeals for the First Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said Circuit Court of Appeals had in the case numbered and en-

titled on its docket 2465, Bradford Electric Light Company, Inc., Defendant, Appellant, v. Jennie M. Clapper, Administratrix, Plaintiff, Appellee, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States, and that the judgment herein of said District Court be reviewed by the Court, and for such further relief as to this Court may seem proper.

Dated September 15, 1931.

BRADFORD ELECTRIC LIGHT COMPANY, INC.,
By WILLIAM E. LEAHY,
GEORGE T. HUGHES,
STANLEY M. BURNS,
Counsel for Petitioner.

Supreme Court of the United States.

OCTOBER TERM, 1931.

BRADFORD ELECTRIC LIGHT COMPANY, INC.,

Petitioner

v.

JENNIE M. CLAPPER, ADMINISTRATRIX,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

I.

OPINIONS OF CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

The majority opinion of the Circuit Court of Appeals for the First Circuit was handed down under date of January 8, 1931 (Record, p. 361).

The dissenting opinion of Judge Anderson was handed down under date of January 8, 1931 (Record, p. 374).

The majority opinion of the Circuit Court of Appeals for the First Circuit was handed down under date of June 29, 1931 (Record, p. 377).

The dissenting opinion of Judge Wilson was handed down under date of June 29, 1931 (Record, p. 379).

II.

JURISDICTION.

(1) The date of the judgment to be reviewed is June 29, 1931.

(2) The jurisdiction of this Court to questions and issues herein involved is based upon the diversity of citizenship of the parties hereto, the petitioner, the Bradford Electric Light Company, Inc., being a resident and citizen of the State of Vermont, and the respondent, Jennie M. Clapper, being a resident and citizen of the State of New Hampshire.

(3) The amount involved is in excess of $3,000, exclusive of interest and costs (Record, pp. 10, 40).

(4) The authority believed to sustain said jurisdiction is United States Judicial Code, sec. 24, as amended.

III.

STATEMENT OF THE CASE.

The petitioner, Bradford Electric Light Company, Inc., is a corporation duly established under the laws of the State of Vermont, and is engaged as a public utility distributing electric energy through certain towns in said State of Ver-

mont, and across the Connecticut River into certain towns in the State of New Hampshire.

Leon J. Clapper was a resident of the State of Vermont, and was employed by the petitioner in Vermont in connection with the operation of its electrical system to work within and without said State of Vermont.

In connection with the operation of its plant the petitioner maintained a substation in Haverhill in the County of Grafton, State of New Hampshire, and on the evening of July 30, 1928, due to an electrical storm, fuses in the substation were burned out and Leon J. Clapper in the course of his employment went to the Haverhill substation for the purpose of replacing these burned out fuses, and while in the act of doing so, received the injuries resulting in his death.

The contract of employment of Leon J. Clapper by the petitioner was entered into in Vermont, and under the terms of the Workmen's Compensation Act of the State of Vermont in effect at the time of said employment the provisions of said Act entered into and became an integral part of the contract of employment, and the parties were presumed to have been bound thereby unless they expressly rejected said Act in accordance with its provisions.

At the time of the accident both parties had accepted said Act and neither had rejected it.

In addition to the acceptance of the Vermont Workmen's Compensation Act, the petitioner had also accepted the provisions of the Workmen's Compensation Act of the State of New Hampshire by reason of the fact that in the course of the operation of its business in New Hampshire it was necessary to engage residents of New Hampshire to work upon that type of employment which came within the classifications of the Act requiring employers to accept said Act for the benefit of themselves and their employees.

Other facts have already been stated in the preceding petition under the heading "Summary Statement of the Matter

Involved," which are hereby adopted and made a part of this brief.

IV.

SPECIFICATION OF ERRORS.

The District Court of the United States for the First District erred in holding

(1) That the contract of employment entered into in Vermont between the petitioner and Leon J. Clapper was a contract which purported to release an employer from liability for future negligence.

(2) That the contract of employment so entered into in Vermont between the petitioner and Leon J. Clapper was contrary to the public policy of New Hampshire.

(3) That the contract of employment entered into in Vermont was not a bar to the maintenance of a common law action in New Hampshire.

V.

ARGUMENT.

A.

The contract of employment entered into in Vermont between the Bradford Electric Light Company and Leon J. Clapper was not a contract which purported to release an employer from liability for future negligence.

It is conceded that the Bradford Electric Light Company is a Vermont corporation, is a resident and citizen of said State of Vermont, with a principal place of business at Bradford, Vt.; that Leon J. Clapper was a resident and citizen of said State of Vermont, and never resided in New Hampshire; that the contract of employment between the parties was made in Vermont; that the said Leon J. Clapper was employed to work within and without said State, and no new contract of employment was ever made in New Hampshire.

At the time Leon J. Clapper entered the employ of the Company, the *General Laws of Vermont* relating to Labor, Chap. 241, provided as follows:

"SECTION 5763: ELECTION OF EMPLOYER OR EMPLOYEE. The provisions of this chapter, except sections five thousand seven hundred and sixty-six, five thousand seven hundred and sixty-seven and five thousand eight hundred and twenty-six, shall not apply to an employer or employee unless prior to the injury they shall have so elected by agreement, either express or implied, as hereinafter provided. Such agreement shall be a surrender by the parties thereto of their rights to any other method, form or amount of compensation or determination thereof than as provided in this chapter, and shall bind the employee himself, his widow, the employee's widower, personal representative and next of kin and dependents as hereinafter defined, as well as the employer and those conducting his business during bankruptcy or insolvency."

"SECTION 5765: SAME; AS TO CONTRACTS MADE SUBSEQUENT TO JULY FIRST, NINETEEN HUNDRED AND FIFTEEN. Every contract of hiring, verbal, written or implied, made subsequent to July first, nineteen hundred and fifteen, shall be presumed to have been made subject to the provisions of this chapter, unless there is, as a part of such contract, an express statement in writing prior to accident, either in the contract itself or by written notice by either party to the other and to said commissioner, that the provisions of this chapter, other than sections five thousand seven hundred and sixty-six, five thousand seven hundred and sixty-seven and five thousand eight hundred and twenty-six, are not intended to apply, and it shall be presumed that the parties have elected to be subject to the provisions of this chapter and to be bound thereby. In the employment of minors, this chapter shall be presumed to apply unless the notice is given by or to the parent or guardian of the minor. The agreement for the operation of the provisions of this chapter, other than sections five thousand seven hundred and sixty-six, five thousand seven hundred and sixty-seven and five thousand eight hundred and twenty-six, may be terminated by either party upon sixty days' notice to the other and to said commissioner, in writing prior to any accident."

"SECTION 5770: INJURIES OUTSIDE OF STATE. If a workman who has been hired in this state receives personal injury by accident arising out of and in the course of such employment, he shall be entitled to compensation according to the law of this state, even though such injury was received outside of this state."

It is further conceded that at the time Leon J. Clapper received the injuries resulting in his death, neither the employer nor employee had filed a declaration electing not to accept the provisions of the Workmen's Compensation Act as provided by this Act, and therefore, the provisions of the statute became a part of the contract of employment.

The Vermont Act is what is known as the elective type, and in the event of the failure of the employee to elect not to be bound by the provisions of the Act, so as to retain his common law rights, he is bound by the exclusive remedies provided for in the Act.

Smith v. *Van Noy Interstate Co.*, 262 S. W. 1048.
Kennerson v. *Thames Towboat Co.*, 89 Conn. 367, 371.
Powers v. *Hotel Bond Co.*, 89 Conn. 143, 147.
Hopkins v. *Matchless Metal Polish Co.*, 99 Conn. 457, 460.
Gooding v. *Ott*, 77 W. Va. 467.
Hunter v. *Coal Co.*, 175 Ia. 245.
Denny v. *Comp.*, 36 N. J. L. 121.
Industrial Comm. v. *Ins. Co.*, 64 Col. 490.
Dettloff v. *Co.*, 195 Mich. 117.
Grinnell v. *Wilkinson*, 39 R. I. 447.
Barnhart v. *Steel Co.*, 227 N. Y. 531.
Martin v. *Copper Corp.*, 252 Fed. 397.

One of the principal reasons advanced by the Circuit Court in sustaining the verdict in favor of the respondent was that the contract of employment entered into between the parties in Vermont purported to release the employer from liability

for future negligence and therefore could not be sustained in New Hampshire, where the injury was received.

The contract of employment entered into between the parties embodied the terms of the Vermont Workmen's Compensation Act. Does this Act purport to release the employer from liability for future negligence?

It is true that there are a line of decisions which hold that any contract entered into between an employer and employee which is intended to relieve the employer from *all* liability of whatsoever nature in the event of the employer's negligence resulting in injury to the employee is void as against public policy.

Baker v. *Railroad*, 74 N. H. 100.
Piper v. *Railroad*, 75 N. H. 228.
Conn v. *Amusement Co.*, 79 N. H. 450.
Wessman v. *Railroad*, 84 N. H.
Johnston v. *Fargo*, 184 N. Y. 379.

The contract in the case at bar, however, is not a contract of that type. It is just the reverse. In this case the contract entered into between the employer and employee provided for payment of compensation in the event of injury arising in the course of his employment regardless of, and aside from, any negligence on the part of the employer. The employee could recover in this case, under his contract of employment without allegation or proof of negligence on the part of his employer, and the defenses of contributory negligence, assumption of risk and negligence of a fellow servant were not available to the employer to preclude recovery on the part of the injured employee.

The distinction between the class of cases relied upon by respondent as relieving an employer from liability for future negligence and that class of cases wherein the employer agrees to pay the injured employee regardless of negligence, is made in the recent case of *Western Union Telegraph Company* v. *Esther Tompa*, decided July 17, 1931, by the United States Circuit Court of Appeals, Second Circuit.

In the *Tompa* case:

"The plaintiff employed the defendant to work as a cook on its work trains. While so employed on a train operated over the right of way of the New York Central Railway Company in the State of New York, she was injured when the plaintiff's train, on which she was working, collided with one of the railroad's trains, at a siding at Cohoes, New York, on September 23, 1927. The plaintiff was, and is, willing and able to pay her compensation for the injury in accordance with the provisions of the New York Workmen's Compensation Law and did make one payment to her on January 30, 1928. Thereafter, she brought suit in the New York Supreme Court against the New York Central Railroad Company to recover her damages for the injury. That company thereupon notified this plaintiff that it would look to it for reimbursement for all damage and expense suffered by reason of such suit in accordance with a contract of which the material part is later summarized. The plaintiff then brought this suit to restrain the defendant from proceeding with her action against the railroad company and to require her specific performance of an agreement she made with the defendant relating to compensation for injuries or death.

At the time the defendant was employed by the plaintiff and continuously up to and including the date she was injured, there was in force between the plaintiff and the railroad company a contract which the railroad company's predecessor had made with the plaintiff to the effect, *inter alia*, that if any employee of the plaintiff was injured in the course of his employment and while on the premises of the railroad company, the plaintiff would indemnify and save the railroad company harmless from all loss or damage of any kind arising from such injury to such employee.

When the defendant entered the employ of the plaintiff, she signed the following agreement:—

'Whereas, the Western Union Telegraph Company has adopted and now has in effect a relief plan for the payment of compensation to its employees in the event of their accidental injury or death occurring in the course of their employment; and whereas in the course of my duties as an employee of the above named company, it will be necessary for me from time to time to travel over

lines of railroads which the above named company has contracted to indemnify against any liability for injury to or death of persons in its employ while traveling or being on the railroad companies' premises or rights of way in connection with the telegraph company's business, either on a pass or otherwise; now, therefore, it is stipulated and agreed to by me, in consideration of my employment by the said company, and as a term or condition of such employment, that in case of my accidental injury or death in the course of my employment for the said company while traveling or being on the premises or right of way of any such railroad, I, or my personal representatives, will look for compensation solely to The Western Union Telegraph Company's relief plan before referred to, of which I have been furnished a copy and with which I am familiar, or to the Workmen's Compensation Act, if any, which may apply in such case, and that no railroad company which my said employer may have agreed to indemnify against liability for my injury or death shall be liable to me or my personal representative for such injury or death, whether or not the same shall be caused by the negligence of such railroad company or its servants.

Ester Tompa Cook
(Signature)
January 25, 1927
Date

Geo. Hillman,
Witness.

It remained unchanged at the time she was injured and the District Court decided, after hearing and considering evidence on that subject, that when she signed the agreement she did so freely after it was explained to her and she understood its meaning. Insisting that it is bound to indemnify the railroad for any loss or damage it may suffer by reason of the suit the defendant has brought against it and relying upon the defendant's agreement above set forth, the plaintiff now seeks injunctive relief on the theory that it has no complete and adequate remedy at law in that the defendant has no property and so is judgment proof. The defendant has taken the position that the plaintiff has no remedy at all in

this action because 28 U. S. C. A. Sec. 379 forbids the issuance of an injunction and also because there is no equity in this suit since the agreement of the defendant is against public policy and void."

The Court, in its opinion, said:

"The agreement does not limit the liability of the plaintiff to any private plaint of its own for the payment of compensation to its injured employees but leaves such liability as there may be under the provisions of the New York Workmen's Compensation Law unimpaired. It does deny to the plaintiff the right to sue a third person. We think that such agreements as that made by the defendant have already been held by controlling authority not to be contrary to public policy but valid and enforceable. *Wells Fargo & Co. v. Taylor*, 254 U. S. 175. Compare, *Baltimore & Ohio Southwestern Railway Co. v. Voigt*, 176 U. S. 498."

As the Court, Wilson, J., said in the case at bar:

"It is true that contracts for relief against future negligence in this country are held void as against public policy; but a contract for adequate compensation in case of injury by accident, whether due to negligence of either employer or employee, or occurring without the negligence of either, is quite different from a contract under which an employee receives no benefit, but relieves the employer from all liability for future negligence. In the one case, it is held to be a contract in the interest of the workman, and in the other, that it is so hostile to his interest and so conducive to neglect on the part of the employer to provide the ordinary provisions of safety for its employees, that it is, so far as we know, upheld by no court in this country."

(See dissenting opinion, Record p. 382.)

Assuming, but not conceding, that the contract in question is of that type claimed by the employee, i.e., a contract relieving an employer from liability for future negligence, it is valid in Vermont where made, and therefore should be recognized and enforced in New Hampshire.

Fonseca v. Cunard Steamship Line, 153 Mass. 553, 557.

O'Regan v. *Cunard Steamship Line*, 160 Mass. 356, 361.

Stone v. *Old Colony St. Railway*, 212 Mass. 459, 464.

Mittenthal v. *Mascagni*, 183 Mass. 19.

Wells Fargo & Co. v. *Taylor*, 254 U. S. 175, 188.

Smith v. *Godfrey*, 28 N. H. 379.

In the case of *Barnhart, Admx.* v. *The American Concrete Steel Co.*, 227 N. Y. 531, the plaintiff was employed in New Jersey by a New Jersey corporation and was killed while temporarily working in New York. At the time of his employment New Jersey had a compensation act the provisions of which were analogous to the Vermont Act. Suit was instituted at common law in New York to recover damages for his death and the plaintiff claimed that the New Jersey Workmen's Compensation Act did not apply because it was contrary to the public policy of New York, citing and relying upon *Johnston* v. *Fargo*, 184 N. Y. 379, which was an agreement relieving an employer from liability for future negligence.

In dismissing the common law action the Court, McLaughlin, J., said (p. 537):

> "I can see no analogy between this case and the case presented in *Johnston* v. *Fargo* (supra). This is not an attempt to relieve the employer from liability. It is nothing more than an attempt to establish a scale of compensation which shall give the employee a remedy for all injuries, whether due to negligence or not. There is no doubt that such a contract would bind the employer, and if so, no reason has been suggested why it ought not to bind the employee. If it did bind him, then at the moment of his death his common-law right of action had been barred, and being barred against him, it was barred also against his representatives. The contract of employment was valid in New Jersey, and being so, prevents the maintenance of an action for the recovery here sought in New York. *Piatt* v. *Swift & Co.*, 188 Mo. App. 584; *Pendar* v. *H & B American Machine Co.*, 35 R. I. 321."

B.

The contract of employment entered into in Vermont between the Bradford Electric Light Company, Inc., and Leon J. Clapper was not contrary to the public policy of New Hampshire.

The majority opinion sustaining the verdict in the District Court was based upon the ground that the contract of employment between the parties changed the public policy of New Hampshire.

(Opinion, Record, pp. 377, 378.)

In the case of *Johnson* v. *Ismert-Hincke Company*, 116 Kan. 734, the Court said:

> "The Workmen's Compensation Law fixed the liability of an employer to his employee where both parties are under the law, and this liability is founded upon the contract of employment and the statute. The liability in no sense depends upon tort. It is a liability growing out of a contract, the terms of the statute being embodied in the contract."

That the terms of the Workmen's Compensation Act of Vermont entered into and formed a part of the contract of employment between the parties is not seriously contested by the respondent but it is claimed that the Workmen's Compensation Act of Vermont is contrary to the public policy of New Hampshire because it differs in some of its terms and provisions from the New Hampshire Workmen's Compensation Act:

> "But it by no means follows that, because the statute of one state differs from the law of another state, therefore it would be held contrary to the public policy of the laws of the latter state. Every day our Courts are enforcing rights under foreign contracts where the *lex loci contractus* and the *lex fori* are altogether different, and yet we construe these contracts and enforce rights under them according to their force and effect under the laws of the state where made. To justify a court in refusing to enforce a right of action which accrued under the law of another state, because against the public policy of our laws, it must appear that it is against good

morals or natural justice, or that, for some other such reason, the enforcement of it would be prejudicial to the general interests of our citizens."

Northern Pac. Ry. Co. v. Babcock, 154 U. S. 190; Opinion, pp. 372, 373.

It is to be noted with interest that the majority opinion states no reasons nor cites any cases in support of its position.

If the case of *Saloshin, Admx. v. Houle (N. H.)* decided May 5, 1931, is cited as an authority in support of the Court's position it is clearly inapplicable and not in point.

We are in accord with the analysis of the *Saloshin* case as made by Wilson, J., in his dissenting opinion (Record, p. 381), and contend that it is an authority for, rather than against, the petitioner.

The Workmen's Compensation Act of Vermont differs from that of New Hampshire in that under the Vermont Act the employee must make his election to retain his common law rights when entering the employ of his master and prior to receiving the injury, otherwise he is presumed to have accepted and is bound by the provisions of the Act, while in New Hampshire the employee has the right to elect *after* receiving the injury, whether he will accept compensation or proceed at common law.

It is because of this difference it is contended the Vermont Act is contrary to the public policy of New Hampshire.

The term "public policy" has been judicially defined numerous times but the majority of courts agree that under the rules of comity, contracts valid in the state where made will be enforced unless the agreement "is contrary to good morals of the state or its citizens would be injured by its enforcement or it persistently violates positive written or unwritten [illegible] law."

We respectfully submit that a careful analysis and comparison of the two acts will satisfy this Court that the Ver-

mont Act is not contrary to the public policy of New Hampshire:

"The mere fact that statutes of different states, of the same general character, differ in some feature, does not render a contract entered into in one state and valid under its statute unenforcible in another state because it does not conform to its statute."

Swann v. *Swann*, 21 Fed. 299, 306.
Reynolds v. *Day*, 79 Wash. 499, 502.
Herrick v. *Minn. & St. L. R. Co.*, 31 Minn. 11.
Northern Pac. v. *Babcock*, 154 U. S. 190.
Chicago & E. I. R. Co. v. *Rouse*, 178 Ill. 102.
Higgins v. *Central N. E. & W. R. Co.*, 155 Mass. 176, 180.
Dennick v. *R. R. C.*, 103 U. S. 11.
Barnhart v. *Am. Concrete Steel Co.*, 227 N. Y. 531.
Schweitzer v. *Hamburg-American Line*, 138 N. Y. S., 944.
Howard v. *Howard*, *N. Car. Sup. Ct.*, decided April 1, 1931.
Bliss v. *Houghton*, 16 N. H. 90, 91, 92.
Adams v. *Gay*, 19 Vt. 358, 367.
2 Kent 117, 118.

Dissenting opinion, Record p. 384.

Great emphasis is laid by the Court upon the fact that the employer had accepted the provisions of the New Hampshire Workmen's Compensation Act (Opinion, Record, p. 377).

In considering this phase of the case it is important that we should consider somewhat the facts of the case and its history leading up to the acceptance of the Workmen's Compensation Act in New Hampshire by petitioner, and when that fact first appeared in connection with the trial of this cause.

The petitioner is a Vermont corporation with a principal place of business at Bradford, Vermont (Record, p. 204). It is engaged in the manufacturing and distribution of electric energy. The current is manufactured in Vermont and distributed through wires of the Company through certain sections of Vermont and across the boundary line into New Hampshire. In connection with its New Hampshire properties it of necessity had to employ New Hampshire help to operate in that state.

The respondent, Leon J. Clapper, was domiciled in, and a resident of, Vermont. The contract of hiring was made in Vermont. His employment required him to perform services within and without the State of Vermont.

No new contract of employment was made when the employee performed services outside of the State of Vermont. These services outside of the State were rendered under the contract made in Vermont.

At no time while in the employ of petitioner had he ever resided in New Hampshire, and whenever he had any work to perform in New Hampshire it was of a temporary nature and under the supervision and control of the Bradford office.

At the time he received the injuries complained of in this action, he was temporarily engaged in New Hampshire in performing work upon the petitioner's Haverhill substation.

The case at bar was first filed in the state court by the respondent Jennie M. Clapper, who was then a resident of New Hampshire, in her capacity as administratrix of her brother's estate (Record, p. 3).

The case was transferred to the United States District Court upon petition of the petitioner by reason of the diversity of citizenship of the parties (Record, pp. 4, 5).

When the case was filed in the District Court petitioner filed an answer and brief statement setting forth therein for the first time the fact that respondent's deceased and petitioner had accepted the provisions of, and were bound by, the Vermont Workmen's Compensation Act which was a bar to

the maintenance of this action in New Hampshire (Record, pp. 21, 22, 23, 24).

The respondent filed a Motion to Reject Defendant's Answer and Brief Statement, and assigned therein four reasons why same should be rejected, but it is important to note at this time and in this respect that respondent did not assign as a reason for petitioner's answer being rejected that it had accepted the provisions of the New Hampshire Workmen's Compensation Act (Record, p. 25).

The Court, in its rescript, denied petitioner's motion to dismiss, granted respondent's motion to reject petitioner's answer, and ordered petitioner to go to trial by jury (Record, p. 26). But again no reference is made to the acceptance of the Workmen's Compensation Act of New Hampshire by the petitioner as a reason or basis for denying petitioner's motion to dismiss.

The respondent's motion to reject petitioner's answer was treated by the trial Court and counsel as a demurrer to petitioner's answer and admitted the facts therein set forth. The Court, in its opinion, has so treated the motion (Opinion, p. 364).

The petitioner's answer was complete in that it contained sufficient facts, if proved, to bar respondent's cause of action. By his demurrer, counsel for the respondent admitted all of the facts alleged by the petitioner in its answer, and therefore obviated the necessity of proving same.

The Court in its Rescript said:

> "Actions under the Emplorer's Liability Act in New Hampshire are based on tort, not on contract, and the law of Vermont has no extra-territorial effect." (Record, p. 26.)

By its ruling the Court eliminated the law of Vermont so far as it was applicable to this case, and ordered the petitioner to go to trial under the law of New Hampshire.

Unfortunately, the rule in the Federal Court is such that legal problems arising during the course of the trial cannot be transferred to the Circuit Court of Appeals for judicial

determination until a judgment has been rendered in the District Court. Were the law the same as in our State Court, upon the Court denying the petitioner's motion to dismiss, and granting respondent's motion to reject, the case could immediately have been transferred to the Circuit Court upon petitioner's exception to the Court's ruling, and the same proposition which is now before the Court would then have been presented for this Court's consideration, and the parties involved would have been saved the time and expense of three jury trials.

Furthermore, and this is important, the acceptance of the New Hampshire Workmen's Compensation Act by the petitioner would not then have been presented to this Court and the respondent would have been deprived of that comfort and support which she now attempts to receive from the fact that the petitioner had accepted the New Hampshire Act.

Having been ordered to go to trial in New Hampshire in an action brought by the Administratrix of the Estate of an employee injured in New Hampshire, which action was brought under the Lord Campbell Act of New Hampshire, Chap. 302, P. L. 1926, it was incumbent upon the petitioner to protect its interests by every defense available to it under the New Hampshire law, and from then on the Vermont law was not available to the petitioner as a defense, nor material in any way under the issues raised by the respondent.

As a part of the respondent's case it appeared that three men from Berlin, New Hampshire, came down and assisted in the construction of the line from Pike, New Hampshire, to Lake Tarlton, New Hampshire. These men were linemen and did the same kind of work as Clapper and the others in the construction and reconstruction of the line upon which the respondent subsequently was fatally injured (Record, p. 137).

The Court having ruled that the acceptance of the Vermont Workmen's Compensation Act by both employer and employee was not a bar to the maintenance of the employee's

common law suit in New Hampshire and it appearing that the petitioner had engaged New Hampshire employees to work in New Hampshire upon that type of hazardous employment which came within the definition of the statute, i.e., "the construction, operation, alteration or repair of wires or lines of wires, cables, switchboards, or apparatus charged with electricity" (N. H. Public Laws, 1926, c. 178, s. 1), it was incumbent upon the petitioner, in order to avail itself of the defenses of assumption of risk and negligence of a fellow servant (Public Laws, c. 178, ss. 2, 3, 4), to prove that it had accepted the provisions of the New Hampshire Workmen's Compensation Act, and that same were in force on the date of this accident.

> "In a servant's action for injuries caused by his master's negligence, the burden is on the latter to show that he has accepted the compensation provisions of the employer's liability act (Laws 1911, c. 163); in the absence of proof of such acceptance assumption of the risk is not a defense."
>
> *Spilene* v. *Company*, 79 N. H. 326.

Accordingly, and as a part of the petitioner's case, before any evidence was introduced, the petitioner offered to prove that it had accepted the provisions of the New Hampshire Workmen's Compensation Act, and that same were in effect on the date of the accident, but the respondent admitted the facts to be as stated in the offer and further proof became unnecessary (Record, p. 203), but by so doing the petitioner did not assent to the New Hampshire Act alone governing the rights of the parties nor waive any rights it had under its motion to dismiss.

If there was any question on the part of the respondent that the petitioner had accepted the Workmen's Compensation Act of New Hampshire for the benefit of others than its New Hampshire employees, it had the opportunity then and there to make further inquiry to elicit this information, but as the facts were admitted to be as offered by petitioner, it is apparent that it was obvious to respondent's counsel

why the New Hampshire Act had been accepted by petitioner.

And, indeed, it is perfectly apparent and obvious to anyone why petitioner had accepted the New Hampshire Act. The evidence disclosed that the petitioner's lines ran through and served the towns of Haverhill, Woodville, Bath, Lisbon, Littleton and Bethlehem, all of which were in New Hampshire (Record, p. 207).

Assume, for the purpose of argument, that one of the three men who came down from Berlin to assist in the construction of the line (Record, pp. 137, 234) had been injured within the scope of his employment. Certainly it would have been no defense as to this injured employee for the petitioner to assert and rely upon the acceptance by it of the Vermont Workmen's Compensation Act and not the New Hampshire Act. And why? Because the employee from Berlin was domiciled and resident in New Hampshire, the contract of employment with him was made in New Hampshire, and he was governed and controlled by the New Hampshire Act. It can not reasonably, logically and legally be contended that the Berlin employee and Clapper were in the same category and that their cases would be governed by the same Workmen's Compensation Acts.

As the Court said in the case at bar:

> "The defendant company accepted the New Hampshire Act, but neither the deceased nor his representative ever did. While the defendant's reasons for so doing were not disclosed by direct testimony it appears in the record that its operations extended some distance into New Hampshire, and it perforce must at times, at least, have employed men in that State as well as in Vermont. If it wished to retain its common law defenses as to these men, it must accept the act."
>
> (Opinion, Record, p. 366.)

Workmen's Compensation Acts, in various states, the terms of which are almost identical with those in the case at bar, have been considered by the Federal Courts and the courts of last resort of various States, and in no case has any

such statute been held invalid as against public policy, or in violation of any constitutional provision on this ground.

Opinion of Justices, 209 Mass. 607, 610, 611.
Mackin v. *Company*, 187 Mich. 8.
American Rad. Co. v. *Rogge*, 86 N. J. L. 436.
Johnston v. *Corp.*, 248 Fed. 407.
Hopkins v. *Comp.*, 99 Conn. 457, 460.
Cram v. *Riley*, 214 Mich. 218.
Industrial Commission v. *Ins. Co.*, 64 Col. 480.
Rounsaville v. *Comp.*, 87 N. J. L. 371.
Pierce v. *Storage Comp.*, 185 Iowa 1346.
Foughty v. *Ott*, 80 W. Va. 88.
Chambers v. *District Court*, 139 Minn. 205.
Anderson v. *Comp.*, 169 Wis. 106.
Post v. *Berger & Gohlke*, 216 N. Y. 544.
Hospers v. *Smith*, 230 N. Y. 616.

"It is now well settled that Compensation Acts are not contrary to public policy, but are everywhere recognized as humane, economic and in the interest of the employee and the general welfare of the state; and nowhere is this more admirably stated than in *Mulhall* v. *Nashua Mfg. Co.*, 80 N. H. 194.

* * * * *

In view of the declarations in *Mulhall* v. *Nashua Mfg. Co.*, *supra*, we cannot conceive of the New Hampshire court of last resort holding as a general proposition that a statute, which has been adopted in so many states, and acclaimed far and wide as one of the most beneficent acts of recent years in promoting the general welfare of the workingman, is contrary to the general welfare of the citizens of New Hampshire."

Opinion, Record, pp. 369, 370.

C.

The contract of employment entered into in Vermont between the Bradford Electric Light Company, Inc., and

Leon J. Clapper was a bar to the maintenance of a common law action in New Hampshire.

The *General Laws of Vermont*, relating to Labor, in effect at the time Leon J. Clapper entered the company's employ and at the time of the accident in question, provided as follows (Chapter 241, Section 5774):

> "RIGHT TO COMPENSATION EXCLUSIVE: The rights and remedies granted by the provisions of this chapter to an employee on account of a personal injury for which he is entitled to compensation under the provisions of this chapter, shall exclude all other rights and remedies of such employee, his personal representatives, dependents or next of kin, at common law or otherwise on account of such injury. Employers who hire workmen within this state to work outside of the state may agree with such workmen that the remedies under the provisions of this chapter shall be exclusive as regards injuries received outside this state by accident arising out of and in the course of such employment, and all contracts of hiring in this state shall be presumed to include such an agreement."

Reference to the above statute discloses that the remedies provided thereby are exclusive of all other remedies in the case of injuries. This is the universal rule and has been adopted and approved almost unanimously by the Courts which have had occasion to consider this phase of the Act.

Kennerson v. *Thames Towboat Co.*, 89 Conn. 367, 371.
Powers v. *Hotel Bond Co.*, 89 Conn. 143, 147.
Hopkins v. *Metal Polish Co.*, 99 Conn. 457, 460.
Gooding v. *Ott*, 77 W. Va. 467.
Hunter v. *Coal Co.*, 175 Ia. 245.
Denny v. *Co.*, 38 N. J. Law J. 121.
Industrial Commission v. *Ins. Co.*, 64 Col. 480.
Dettloff v. *Co.*, 195 Mich. 117.
Grinnell v. *Wilkinson*, 39 R. I. 447.
Barbaro v. *Co.*, 227 N. Y. 581.

Martin v. *Corp.*, 252 Fed. 297.
Ora Scott v. *White Eagle Oil & Refining Co.*, District Court of United States, District of Kansas decided February 3, 1930.

"As between the employer and employee the remedy provided by the Workmen's Compensation Law is exclusive."

Shade v. *Co.*, 92 Kan. 146.
McRoberts v. *Co.*, 93 Kan. 364.
Moeser v. *Shunk*, 116 Kan. 247.
Johnson v. *Co.*, 116 Kan. 734.
Grant Smith-Porter Ship Co. v. *Rohde*, 257 U. S. 469.

The *General Laws of New Hampshire*, 1926, in effect at the time the common law suit was instituted in this State, provided as follows (Chapter 178, Section 11):

"BARRING SUIT AT LAW. The right of action for damages caused by any such injury, at common law or under any statute, shall not be affected by this chapter, but in case the injured workman, or in event of his death his executor or administrator, shall avail himself of this chapter, either by accepting any compensation hereunder, by giving the notice hereinafter prescribed, or by beginning proceedings therefor in any manner on account of any such injury, he shall be barred from recovery in every action at common law or under any other statute on account of the same injury."

By the provisions of the Vermont Act the employee is presumed to have accepted its terms in the absence of the filing of a declaration not to be bound by it. No such declaration was filed by the employee in the case at bar. It is to be noted further that the Vermont Workmen's Compensation Act contains the so called extra-territorial clause and applies to injuries arising outside of the State of Vermont and of necessity covers the accident in question. It therefore follows that prior to the institution of the common law suit in New Hampshire the employee had already accepted, and was bound by,

the provisions of the Vermont Workmen's Compensation Act which not only by its terms, but by the statutes and decisions in New Hampshire barred his estate from maintaining a common law action in New Hampshire.

> **"One who has accepted the provisions of the Workmen's Compensation Act is barred from maintaining a common law action for negligence to recover for the same injury."**
>
> *Watts* v. *Company*, 79 N. H. 299.
> *Davis* v. *Company*, 82 N. H. 87.

If the employee or his representatives had applied for compensation in New Hampshire under the New Hampshire Workmen's Compensation Act the petition would be dismissed and the employee referred to Vermont where the contract of employment was made. The New Hampshire courts would have had no jurisdiction to grant compensation under the New Hampshire Act.

Hopkins v. *Comp.*, 99 Conn. 457.
Pettiti v. *Pardy Construction Co.*, 103 Conn. 101, 109.
Minto v. *Hitchings*, 198 N. Y. S. 610.
Schweitzer v. *Hamburg-American Line*, 138 N. Y. S. 944.
Barnhart v. *Co.*, 227 N. Y. 531.
Norman v. *Furniture Co.*, 84 Ind. App. 173.
Mosely v. *Fuel Co.*, 313 Mo. 225.
Wasilewski v. *Warner Co.*, 149 N. Y. S. 1035.

The Courts have repeatedly granted compensation in accordance with the provisions of the Workmen's Compensation Act in the state where the contract of employment was made even though the injuries were received outside the state of employment.

Smith v. *Van Noy Interstate Co.*, 150 Tenn. 25.
Zurich Co. v. *Ind. Comm. Wis.*, 213 S. W. 630.
Kennerson v. *Comp.*, 89 Conn. 367.

Haulfroit v. *Escanaba Mfg. Co.*, 188 N. W. 411.
Cram v. *Riley*, 214 Mich. 218.
Post v. *Burger-Gohlke*, 216 N. Y. 544.
Pederzoli's Case, Sup. Ct. Mass., decided Jan. 3, 1930.
Sanders' Case, 126 Maine 144.

VI.

CONCLUSION.

"We are of the opinion that there is nothing in the contract entered into between these parties in Vermont that is contrary to the main purpose of the New Hampshire act or inimical to the welfare of its citizens, and according to the trend of recent decisions in other jurisdictions, the contract of hire under the Vermont Act, upon the principles of comity, constitutes a good defense to an action under the New Hampshire death statute, there having been no contract of hire in New Hampshire."

Opinion, Record, p. 374.

Judge Wilson in his dissenting opinion, used the following language:

"I desire particularly to go on record as opposed to the ruling of the majority opinion that New Hampshire will not recognize a contract of employment under a Workmen's Compensation Act of another state that requires the assent of the workman before an injury to entitle him to its benefits, on the ground that it is contrary to the public policy of New Hampshire. The New Hampshire court has never so declared, and we cannot conceive of any court holding that a statute so generally held to be conceived in the interest of the workingman was inconsistent with the welfare of the citizens of New Hampshire. See *Mulhall* v. *Mfg. Co.*, 80 N. H. 194.

* * * *

I am firmly of the opinion that there is nothing in the contract entered into between these parties in Vermont that is contrary to the purpose of the New Hampshire Compensa-

tion Act as defined by the Court of that state in *Mulhall* v. *Nashua Mfg. Co.*, 80 N. H. 194, or inimical to the welfare of its citizens and the public policy of that state; and according to the trend of decisions in other jurisdictions, the rights of the parties should have been held to be governed by the Vermont contract, which provided for the plaintiff's only and exclusive relief for the death of her intestate.

Dissenting Opinion, Record, pp. 380, 381, 385.

* * * * *

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers by granting a writ of certiorari, and thereafter reviewing and reversing said decision.

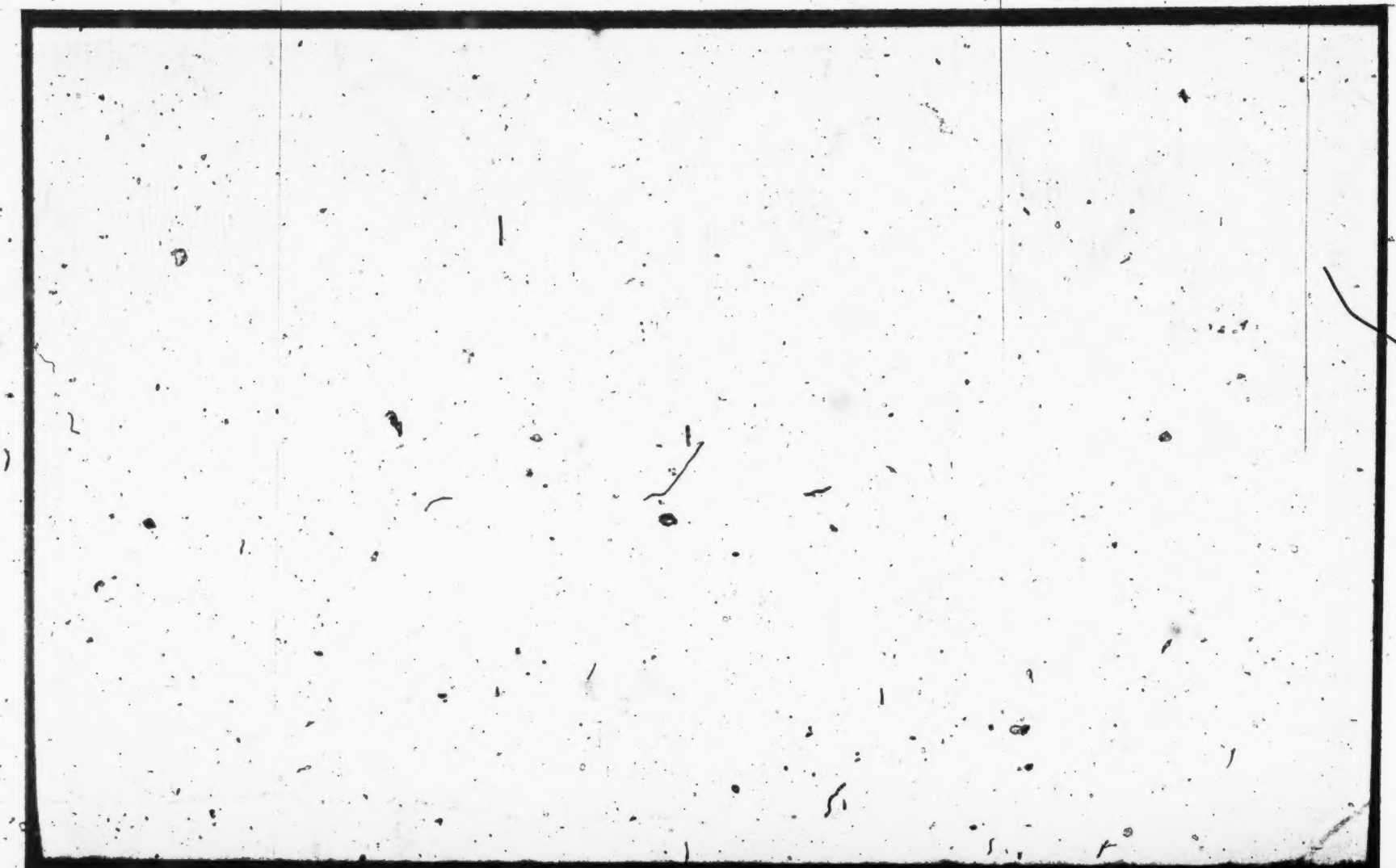
Your petitioner presents to this Court and files herewith as an exhibit hereto a duly certified transcript of the entire record in the case as the same appears in the United States Circuit Court of Appeals.

Your petitioner, Bradford Electric Light Company, Inc., has appealed from the decision of the Circuit Court of Appeals rendered June 29, 1931, and said appeal is now pending. Your petitioner desires to have said petition for writ of certiorari considered in connection with said appeal.

Respectfully submitted by

BRADFORD ELECTRIC LIGHT COMPANY, INC.,

By WILLIAM E. LEAHY,
GEORGE T. HUGHES,
STANLEY M. BURNS,
Counsel for Petitioner.



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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931.

No. 423

BRADFORD ELECTRIC LIGHT COMPANY, INC.,
APPELLANT,

vs.

JENNIE M. CLAPPER, ADMINISTRATRIX.

STATEMENT AS TO JURISDICTION.

WM. E. LEAHY,
GEORGE T. HUGHES,
STANLEY M. BURNS,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931.

No. 423

BRADFORD ELECTRIC LIGHT COMPANY, INC.,
APPELLANT,

vs.

JENNIE M. CLAPPER, ADMINISTRATRIX.

STATEMENT OF BASIS ON WHICH APPELLANT CONTENDS THE SUPREME COURT OF THE UNITED STATES HAS JURISDICTION TO REVIEW ON APPEAL THE JUDGMENT APPEALED FROM, AS REQUIRED BY SUPREME COURT RULE 12.

Pursuant to Supreme Court Rule 12, par. 1, Bradford Electric Light Company, Inc., the above appellant, files this, its statement showing the basis on which said appellant contends that the Supreme Court has appellate jurisdiction to review on appeal the judgment appealed from herein, as follows:

I. The statute believed to sustain appellate jurisdiction is section 240 (b) Judicial Code (28 U. S. C. A. 347), which provides that

> (*b*) Any case in a circuit court of appeals where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is against its validity, may, at the election of the party relying on such State statute, be taken to the Supreme Court for review on writ of error or appeal; but in that event a review on certiorari shall not be allowed at the instance of such party, and the review on such writ of error or appeal shall be restricted to an examination and decision of the Federal questions presented in the case.

II. The judgment appealed from was entered on the twenty-ninth day of June, 1931, as appears from page 385 of the printed record herein.

III. The application for an appeal was presented on the twelfth day of September, 1931, as appears from page 386 of the printed record herein, and was allowed September 12, 1921. (R. 389.)

IV. The appeal herein is from a judgment of the Circuit Court of the United States for the First Circuit in a civil case at law to recover damages for personal injuries resulting in the death of Respondent's intestate, Leon J. Clapper, said injuries being sustained by the said Leon J. Clapper while in Petitioner's employ, to review the opinions of said United States

Circuit Court for the First Circuit, handed down under dates of January 8, 1931, and June 29, 1931, respectively as appears from pages 361 and 374 of the printed record herein.

Appellee's intestate was in the employ of appellant and fatally injured July 30, 1926, at Haverhill, New Hampshire, prior to which time appellant, a public utility engaged in interstate commerce had accepted the provisions of the Workmen's Compensation Act of the State of Vermont (R. 203), wherein appellant was incorporated. The provisions of said Act were extra-territorial in operation and applied to injuries received outside the State of Vermont. (Chapter 241 General Laws of Vermont relating to Labor, Sections 5765, 5770, 5774, 5762.)

The question of the extra-territorial effect of the Vermont laws was specifically raised and ruled on. (R. 25, 26.)

The Circuit Court of Appeals, contrary to the provisions of Article IV, Sec. 1, of the Constitution of the United States, failed to give full faith and credit to the General Laws of Vermont relating to Labor, Chapter 241, Sections 5763, 5765, 5770, 5774, and 5762, in the State of Vermont, which laws by agreement of the parties become part of the contract of employment.

Pollard v. *Bailey*, 20 Wall., 520, 527.
Galveston Ry. v. *Wallace*, 223 U. S. 481, 490.
Stewart v. *B. & O. R. Co.*, 168 U. S. 445.
National Bank v. *Francklyn*, 120 U. S. 747, 753.

The validity of Sections 5763, 5765, 5770, 5774, and 5762 of the laws of Vermont relating to Labor was

specifically drawn in question by appellant as shown by the opinions of the court below (R. 361-383) and by the petition for the appeal (R. 386) and the assignment of errors. (R. 387-388.)

V. The cases believed to sustain the jurisdiction are as follows:

Dennick v. *Central R. R. Co.*, 103 U. S. 11;
Northern Pacific Railroad v. *Babcock*, 154 U. S. 190;
Stewart v. *Baltimore & Ohio Rd. Co.*, 168 U. S. 445;
Hancock Nat'l Bank v. *Farnum*, 176 U. S. 640;
Slater v. *Mexican National Rd. Co.*, 194 U. S. 120;
Davis v. *Mills*, 194 U. S. 451;
St. Louis etc. Co. v. *Taylor*, 210 U. S. 281;
American Express Co. v. *Mullins*, 212 U. S. 311
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Montana Mining Co. v. *St. Louis etc. Co.*, 204 U. S. 204;
Security Trust Co. v. *Dent*, 187 U. S. 237;
O'Callaghan v. *O'Brien*, 199 U. S. 89;
James-Dickinson etc. Co. v. *Harry*, 273 U. S. 119;
See also: *Ora Scott* v. *White Eagle Oil and Refining Company*, decided February 3, 1930, by Federal District Court of Kansas;
Barnhart v. *Am. Concrete Steel Co.*, 277 N. Y. 531;
Mulhall v. *Nashua Mfg. Co.*, 80 N. H. 194.

See also statement of Circuit Judge Wilson in dissenting opinion, (R. 379), as follows:

> The case at bar "is one of new impressions, and owing to the peculiar nature of the New Hampshire Employers' Liability and Compensation Act is unique in the issues it presents, *and of importance to employers, especially in adjoining states.*"

Dated October 26, 1931.

Respectfully submitted,

WM. E. LEAHY,
GEORGE T. HUGHES,
STANLEY M. BURNS,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931.

No. 423

BRADFORD ELECTRIC LIGHT COMPANY, INC.,
Petitioner

v.

JENNIE M. CLAPPER, ADMINISTRATRIX
OF THE ESTATE OF LEON J. CLAPPER,

BRIEF OF PETITIONER

By WILLIAM E. LEAHY,
Washington, D. C.
GEORGE T. HUGHES,
STANLEY M. BURNS,
Dover, N. H.

Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931.

No. 423

BRADFORD ELECTRIC LIGHT COMPANY, INC.,

Petitioner

v.

JENNIE M. CLAPPER, ADMINISTRATRIX OF THE ESTATE OF LEON J. CLAPPER,

BRIEF OF PETITIONER

I.

OFFICIAL REPORT OF OPINIONS BELOW.

The opinion of the District Court of the United States for the District of New Hampshire in this case is reported in R. p. 12.

The opinions on appeal in the Circuit Court of Appeals for the First Circuit are reported in 51 Fed. 2nd 992, and 51 Fed. 2nd 999, R. pp. 131, 145.

The opinion dismissing the appeal and granting the petition for writ of certiorari is reported in 52 Supreme Court Reporter, 118.

II.

STATEMENT OF CASE.

This is an action brought by Jennie M. Clapper of Manchester, County of Hillsborough, State of New Hampshire, as administratrix of the estate of Leon J. Clapper, late of Bradford, County of Orange, State of Vermont, deceased, hereinafter referred to as the plaintiff, against the Bradford

Electric Light Company, Inc., a corporation duly established under the laws of the State of Vermont, with a principal place of business at said Bradford, hereinafter referred to as the defendant, to recover damages for personal injuries resulting in the death of plaintiff's intestate, Leon J. Clapper, on July 30, 1926, while in the employ of the Bradford Electric Light Company, said injuries and death being alleged to be due to defendant's negligence.

The action was originally instituted by a writ dated September 16, 1927, and returnable to the Superior Court for said County of Hillsborough, R. p. 6.

The defendant seasonably petitioned for the transfer of said action to the District Court of the United States for the District of New Hampshire on the ground of diversity of citizenship, the said Jennie M. Clapper being a resident and citizen of New Hampshire, and said Bradford Electric Light Company, Inc., being a resident and citizen of Vermont. R. p. 1.

After the action was entered in the District Court, the defendant filed its answer, brief statement and motion to dismiss, R. p. 7.

The plaintiff filed a motion to reject defendant's brief statement, R. p. 11.

The Court, after hearing the parties, granted plaintiff's motion to reject defendant's answer and brief statement, denied defendant's motion to dismiss, subject to the defendant's exception, as appears by the Court's Rescript, R. p. 12, and the case was tried three times by jury, the third trial resulting in a verdict in favor of the plaintiff in the sum of $4000, R. p. 18.

The defendant is engaged in the manufacture and distribution of electrical energy for light, heat and power purposes. Its distribution system starts at Hartford, Vermont, and runs through the towns of Norwich, Thetford, Fairlee, Bradford, and Newbury, Vermont, and then crosses the Connecticut River into New Hampshire, and runs through the towns of

Haverhill, Bath, Lisbon, Littleton and Bethlehem, New Hampshire, R. p. 68.

Leon J. Clapper was a resident of Newport, Vermont, R. p. 46, until 1924, when he entered the employ of the Bradford Electric Light Company, Inc., at Bradford, Vermont, the contract of employment being entered into in Vermont, and from then on until the date of his death, July 30, 1926, the said Leon J. Clapper continued to be a resident of said Bradford, Vermont, R. p. p. 34, 112.

The plaintiff was employed by the defendant as a lineman, and his duties required his working upon the defendant's transmission lines and distribution system in the states of Vermont and New Hampshire, R. p. 69, 70. At times he performed the duties of a "trouble shooter," or emergency man, who might be sent out at any time to repair sudden breaks in the lines, R. pp. 47, 69, 112.

The defendant had a station at Newbury, Vermont, with certain switches which controlled a transmission line extending to a substation in the town of Haverhill, New Hampshire, located on the easterly side of the Connecticut River, which substation controlled the distribution system in said town of Haverhill. This line extending from Newbury to Haverhill was a single phase system, that is, made up of two wires, R. pp. 32, 71, 118.

In the spring of 1926, a contract was negotiated between the defendant and the Lake Tarleton Club at Lake Tarleton, New Hampshire, whereby the former agreed to extend its lines to the Club and furnish usable voltage, R. p. 71. This contract called for the delivery of service on July 1, 1926, R. p. 71. and in order to comply with its terms it was necessary to change the single phase system then existing from South Newbury to the Haverhill substation to a three phase system by the installation of a third wire, addition of another transformer at the Haverhill substation, and the extension of a third wire on the secondary circuit from Haverhill to Pike, R. p. 72. It was also necessary to run a new three phase line

from Pike to Lake Tarleton, which required new poles, cross arms, etc., trimming out the line and stringing the wires, R. p. p. 72, 73.

The work under the contract on the reconstruction and new construction was started about June 1, 1926, and service was ordered to the Lake Tarleton Club on July 3, 1926, R. p. 72, 79 The work on this contract was performed by defendant's regular employees brought over into New Hampshire each day from the Bradford, Vermont, office, Bradford being about ten miles from Haverhill, R. p. 70. The plaintiff took an active part in all of this work, R. p. 73. Three experienced linemen from Berlin, New Hampshire, were temporarily employed by defendant to assist defendant's regular employees in performing this work, R. pp. 50, 51, 93.

Before any changes were made in the Haverhill substation, the two primary wires leading from Newbury to Haverhill were controlled by two swinging switches located at the top of the poles on the primary side, which switches were controlled or operated by means of a lever extending to the base of the pole, R. pp. 35, 37. The purpose of these switches was to disconnect the current from its source, and when they were open or disconnected, no current could pass into the station, R. pp. 39, 117.

Prior to and after the changes were made at the Haverhill substation there was a switch or disconnect at the Newbury station, which, when open or disconnected, shut off the current to the Haverhill substation, so that the Haverhill substation could be controlled by the switch at Newbury, and when the switch last referred to was open or disconnected, it rendered the Haverhill substation dead or safe to work upon, R. pp. 48, 49, 71.

In changing over the substation at Haverhill from a single phase to a three phase system, no switch or disconnect was installed on the third wire which was run into the substation, so that after the changes were made the Haverhill substation could not be rendered safe to work upon by operating the switch then installed at the Haverhill substation, R. pp. 74, 75

In the evening of July 30, 1926, there was a severe electrical storm in Haverhill, New Hampshire, which blew out certain fuses in the Haverhill substation, R. pp. 27, 88. The plaintiff was requested to go from Bradford, Vermont, across the Connecticut River to Haverhill, New Hampshire, for the purpose of restoring the burned out fuses, R. pp. 89, 90. He went to the Haverhill substation, and before ascending the pole to restore the fuses, opened the switch at the substation, R. pp. 27, 28. Opening or disconnecting the switch at the Haverhill substation did not wholly clear the substation of electricity, and the plaintiff, while engaged in restoring the fuses in the Haverhill substation and in the course of his employment, came in contact with high tension wires and received injuries which caused his death, R. pp. 30, 95. At the time of his death the plaintiff was a resident of Bradford, Vermont, R. p. 112.

The case was then transferred to the Circuit Court of Appeals for the First Circuit on exceptions taken by the defendant, R. p. 19. After hearing the parties, the Circuit Court of Appeals under date of January 8, 1931, handed down an opinion as follows:

> "The judgment of the District Court is vacated, the verdict is set aside and the case is remanded to that court for further proceedings not inconsistent with this opinion; the appellant recovers costs of appeal," R. p. 154.

The plaintiff seasonably petitioned for a rehearing in the Circuit Court of Appeals, and on June 29, 1931, the Court handed down an opinion in which the following order was made:

> "The judgment of the District Court is affirmed with interest and costs," R. p. 166.

The defendant seasonably petitioned for a writ of certiorari to the United States Supreme Court, which was granted, R. p. 161.

III.

SPECIFICATION OF ERRORS.

1. The Circuit Court erred in that the Court held that the contract of employment entered into in Vermont between the employer and employee was a contract which purported to release an employer from liability for future negligence.

2. The Circuit Court erred in that the Court held that the contract of employment entered into in Vermont between the employer and employee was contrary to the public policy of New Hampshire.

3. The Circuit Court erred in that the Court held that the contract of employment entered into in Vermont between the employer and employee was not a bar to the maintenance of a common law action in New Hampshire.

4. The Circuit Court erred in that the Court held that the acceptance in New Hampshire by the employer of the Workmen's Compensation Act, Public Laws of New Hampshire, 1926, c. 178, was binding upon the parties in the case at bar to the exclusion of the rights of the parties under the provisions of the Vermont Workmen's Compensation Act.

5. The Circuit Court erred in that the Court held that when the Bradford Electric Light Company, Inc., invoked and defended under the Workmen's Compensation Act of New Hampshire, it then assented that the New Hampshire Statutes should alone govern the rights of the estate of Leon J. Clapper in the case at bar.

IV.

ARGUMENT.

1. The Circuit Court erred in that the Court held that the contract of employment entered into in Vermont between the employer and employee was a contract which purported to release an employer from liability for future negligence.

The Public Laws of Vermont relating to Labor, Chapter 241, provide as follows:

"*Sec. 5763.* ELECTION OF EMPLOYER OR EMPLOYEE; The provisions of this chapter, except sections five thousand seven hundred and sixty-six, five thousand seven hundred and sixty-seven and five thousand eight hundred and twenty-six, shall not apply to an employer or employee unless prior to the injury they shall have so elected by agreement, either express or implied, as hereinafter provided. Such agreement shall be a surrender by the parties thereto of their rights to any other method, form or amount of compensation or determination thereof than as provided in this chapter, and shall bind the employee himself, his widow, the employee's widower, personal representative, and next of kin and dependents as hereinafter defined, as well as the employer and those conducting his business during bankruptcy or insolvency."

"*Sec. 5765.* SAME; AS TO CONTRACTS MADE SUBSEQUENT TO JULY FIRST, NINETEEN HUNDRED AND FIFTEEN. Every contract of hiring, verbal, written or implied, made subsequent to July first, nineteen hundred and fifteen, shall be presumed to have been made subject to the provisions of this chapter, unless there is, as a part of such contract, an express statement in writing prior to accident, either in the contract itself or by written notice by either party to the other and to said commissioner, that the provisions of this chapter, other than sections five thousand seven hundred and sixty-six, five thousand seven hundred and sixty-seven and five thousand eight hundred and twenty-six, are not intended to apply, and it shall be presumed that the parties have elected to be subject to the provisions of this chapter and to be bound thereby. In the employment of minors, this chapter shall be presumed to apply unless the notice is given by or to the parent or guardian of the minor. The agreement for the operation of the provisions of this chapter, other than sections five thousand seven hundred and sixty-six, five thousand seven hundred and sixty-seven and five thousand eight hundred and twenty-six, may be terminated by either party upon sixty days' notice to the other and to said commissioner, in writing prior to any accident."

"*Sec. 5770.* INJURIES OUTSIDE OF STATE. If a workman who has been hired in this state receives personal injury by

accident arising out of and in the course of such employment, he shall be entitled to compensation according to the law of this state even though such injury was received outside of this state."

"*Sec. 5774.* RIGHT TO COMPENSATION EXCLUSIVE. The rights and remedies granted by the provisions of this chapter to an employee on account of a personal injury for which he is entitled to compensation under the provisions of this chapter, shall exclude all other rights and remedies of such employee, his personal representatives, dependents or next of kin, at common law or otherwise on account of such injury. Employers who hire workmen within this state to work outside of the state, may agree with such workmen that the remedies under the provisions of this chapter shall be exclusive as regards injuries received outside this state by accident arising out of and in the course of such employment, and all contracts of hiring in this state shall be presumed to include such an agreement."

"*Sec. 5762.* GENERAL POWERS OF COMMISSIONER. Questions arising under the provisions of this chapter, if not settled by agreement of the parties interested therein with the approval of said commissioner, shall, except as otherwise provided, be determined by said commissioner. The decisions of said commissioner shall be enforceable by the county court under the provisions of section five thousand eight hundred and nine. From such a decision an appeal shall lie in the same manner as other appeals from said commissioner; but in no case shall such an appeal operate as a supersedeas or stay unless said commissioner or the court to which such appeal is taken, shall so order."

When the plaintiff entered the employ of defendant in 1924, he could elect whether or not he would be bound by the provisions of the Workmen's Compensation Act of Vermont.

The Vermont Act, Chapter 241, Section 5762, provides

"The provisions of this chapter . . . . . shall not apply to an employee or employer unless prior to the injury they shall have so elected by agreement."

If the plaintiff elected not to be bound by the act, his employer would not be protected, and he could have availed himself

self of these rights by filing the declaration provided for by Section 5765. The plaintiff made no such election, and therefore the contract of hiring is "presumed to have been made subject to the provisions of this chapter." By failing to exercise his right of election, the plaintiff surrendered his "rights to any other method, form or amount of compensation or determination thereof than as provided in this chapter."

The Vermont Act is what is known as the elective type, and in the event of the failure of the employee to elect not to be bound by the provisions of the act so as to retain his common law rights, he is bound by the exclusive remedies provided for in the act.

Smith v. *Van Noy Interstate Co.*, 150. Tenn. 25;
Kennerson v. *Thames Towboat Co.*, 89 Conn. 307, 371;
Powers v. *Hotel Bond Co.*, 89 Conn. 143, 147;
Hopkins v. *Matchless Metal Polish Co.*, 89 Conn. 457, 460;
Gooding v. *Ott*, 77 W. Va. 467;
Hunter v. *Coal Co.*, 175 Ia. 245;
Denny v. *Co.*, 36 N. J. L. 121;
Industrial Commission v. *Ins. Co.*, 64 Col. 480;
Dettloff v. *Co.*, 195 Mich. 117;
Grinnell v. *Wilkinson*, 39 R. I. 447;
Barnhart v. *Steel Co.*, 227 N. Y. 581;
Martin v. *Copper Corp.*, 252 Fed. 207.

One of the principal reasons advanced by the Circuit Court in sustaining the verdict in favor of the plaintiff was that the contract of employment entered into between the parties in Vermont purported to release the employer from liability for future negligence, and therefore could not be sustained in New Hampshire, where the injury was received.

The contract of employment entered into between the parties embodied the terms of the Vermont Workmen's Com-

pensation Act. Does this act purport to release the employer from liability for future negligence?

It is true that there is a line of decisions which holds that any contract which is intended to, and does, relieve a person from *all* liability of whatsoever nature in the event of negligence resulting in injury is void as against public policy.

Baker v. *R. R.*, 74 N. H. 100;
Piper v. *R. R.*, 75 N. H. 228;
Conn. v. *Amusement Co.*, 79 N. H. 450;
Wessman v. *R. R.*, 84 N. H. 475;
Johnston v. *Fargo*, 184 N. Y. 379.

The contract in the case at bar, however, is not a contract of that type. It is just the reverse. In this case the contract entered into between the employer and the employee provided for the payment of compensation in the event of injury arising in the course of his employment, regardless of and aside from any negligence on the part of the employer. The employee could recover in this case under his contract of employment without allegation or proof of negligence on the part of his employer, and the defenses of contributory negligence, assumption of risk and negligence of a fellow servant were not available to the employer to preclude recovery on the part of the injured employee.

In the case of *Mulhall* v. *Company*, 80 N. H. 194, 199, the Court said:

"While the statutes that have been enacted in response to this conviction are radical in that they create a liability regardless of fault, and in that they abolish or materially modify the long established doctrines of contributory negligence, of assumption of risk and of negligence of a fellow servant, they are highly remedial in that they offer to the employee as a substitute for the common law action, a certain and sure remedy applicable to all cases of injury not due to his wilful misconduct. . . . The statute being remedial is to be construed liberally in order to fully and adequately effectuate the purpose of its enactment."

The distinction between the class of cases relied upon by plaintiff as relieving an employer from liability for future negligence and that class of cases wherein the employer agrees to pay the injured employee regardless of negligence is made in the recent case of *Western Union Telegraph Company* v. *Esther Tompa*, decided July 17, 1931, and reported in 51 Fed. Rep. 2nd, 1032.

In the *Tompa* case the Telegraph Company, which operated trains over railroad's rights of way, contracted to indemnify railroads against any loss that might be caused by suits brought against railroads by the Company's injured employees. An employee of the Telegraph Company entered into an agreement with the Company providing that she would look solely to the Company for compensation, and that no railroad which the Company had agreed to indemnify should be liable to such employee for injury or death, whether caused by negligence or not.

In construing the validity of this agreement, the Court said:

> "The agreement does not limit the liability of the plaintiff to any private plan of its own for the payment of compensation to its injured employees, but leaves such liability as there may be under the provisions of the New York Workmen's Compensation Law unimpaired. It does deny to the plaintiff the right to sue a third party. We think that such agreements as that made by the defendant have already been held by controlling authority not to be contrary to public policy but valid and enforceable. *Wells Fargo & Co.* v. *Taylor*, 254 U. S. 175, . . . Compare *Baltimore & Ohio Southwestern Railway Co.* v. *Voigt*, 176 U. S. 498."

As the Court, Wilson, J., in the case at bar, said:

> "It is true that contracts for relief against future negligence in this country are held void as against public policy; but a contract for adequate compensation in case of injury by accident, whether due to negligence of either employer or employee or occurring without the negligence of either, is

quite different from a contract under which an employee receives no benefit, but relieves the employer from all liability for future negligence. In the one case, it is held to be a contract in the interest of the workman, and in the other, that it is so hostile to his interest and so conducive to neglect on the part of the employer to provide the ordinary provision of safety for its employees, that it is, so far as we know, upheld by no court in this country."

See dissenting opinion, R. p. 149, 150.

Assuming, but not conceding that the contract in question is of that type claimed by the employee, that is, a contract relieving an employer from liability for future negligence, it is valid in Vermont, where made, and should be recognized and enforced in New Hampshire.

Fonseca v. *Cunard Steamship Line*, 153 Mass. 553;
O'Regan v. *Cunard Steamship Line*, 160 Mass. 356, 361;
Stone v. *Old Colony St. Ry.*, 212 Mass. 459, 464;
Mittenthal v. *Mascagni*, 183 Mass. 19;
Wells Fargo & Co. v. *Taylor*, 254 U. S. 175, 188;
Smith v. *Godfrey*, 28 N. H. 379.

In the recent case of *Precourt* v. *Driscoll*, decided by the New Hampshire Supreme Court December 1, 1931, 85 N. H. —, 157 Atl. 525, the New Hampshire Supreme Court applied the law of Vermont with reference to the burden being upon the plaintiff to show herself in the exercise of due care at the time of the accident which took place in Vermont and the case was tried in New Hampshire, even though the New Hampshire Statute, Public Laws 1926, c. 328, s. 13, provided that the burden of proving contributory negligence on the part of the plaintiff shall be upon the defendant. The Court said in its opinion:

"When no domestic interest controversy, foreign law will be invoked to cover foreign transactions regardless of local statutes as well as of local common law."

In the recent case of *Adams* v. *Thayer*, decided by the New Hampshire Supreme Court, June 25, 1931, 85 N. H. —, 155 Atl. 687, the Court recognized a contract made in Massachusetts and applied the statute of frauds to bar recovery in an action brought on the contract in New Hampshire even though it was doubtful if the same result would have been reached if the contract had been made in New Hampshire.

In the case of *Barnhart, Admx.* v. *American Concrete Steel Company*, 227 N. Y. 531, the plaintiff was employed in New Jersey by a New Jersey corporation and was killed while temporarily working in New York. At the time of his employment, New Jersey had a compensation act, the provisions of which were analagous to the Vermont act. Suit was instituted at common law in New York to recover damages for his death, and the plaintiff claimed that the New Jersey Workmen's Compensation Act did not apply because it was contrary to the public policy of New York, citing and relying upon *Johnston* v. *Fargo*, 184 N. Y. 379, which was an agreement relieving an employer from liability for future negligence.

In dismissing the common law action, the Court, McLaughlin, J., said, p. 537:

> "I can see no analogy between this case and the case presented in *Johnston v. Fargo, supra*. This is not an attempt to relieve the employer from liability. It is nothing more than an attempt to establish a scale of compensation which shall give the employee a remedy for all injuries, whether due to negligence or not. There is no doubt that such a contract would bind the employer, and if so, no reason has been suggested why it ought not to bind the employee. If it did bind him, then at the moment of his death, his common law right of action had been barred, and being barred against him, it was barred also against his representatives. The contract of employment was valid in New Jersey, and being so, prevents the maintenance of an action for the recovery here sought in New York. *Pratt* v. *Swift & Co.*, 188 Mo. App. 624; *Pender* v. *H. & B. Amer. Machine Co.*, 35 R. I. 491."

Whenever any occasion has arisen for the New Hampshire Supreme Court to interpret the Workmen's Compensation Act of this state or to apply it to any particular situation, the Court has repeatedly held that the act is remedial and is to be liberally construed.

Mulhall v. *Co.*, 80 N. H. 194, 199;
Brown v. *Co.*, 82 N. H. 78, 79;
Gordon v. *Co.*, 83 N. H. 221, 222;
Guay v. *Co.*, 83 N. H. 392;
Holland v. *Co.*, 83 N. H. 483;
Arsenault v. *Lepage*, 84 N. H. 497;
Manchester St. Ry. Co. v. *Barrett*, 265 Fed. 557, 560, 561.

The United States Supreme Court in the case of *Madera Sugar Pine Company* v. *Industrial Accident Commission of California*, 262 U. S. 499, said that state Workmen's Compensation Acts, providing for the liability of the employer to make compensation for injuries received by an employee, irrespective of the question of negligence, are sustainable on the broad ground that the state, by reason of its public interest in the safety and lives of employees engaged in hazardous occupations, may provide in the exercise of its police power that the loss of earning power sustained by an employee shall be charged against the industry and not solely on the ground of the state's interest in preventing injured employees or their dependents from becoming public charges.

2. The Circuit Court erred in that the Court held that the contract of employment entered into in Vermont between the employer and employee was contrary to the public policy of New Hampshire.

The majority opinion sustaining the verdict in favor of the employee was based upon the ground that the contract of employment entered into in Vermont between the employer and employee, changed the public policy of New Hampshire. Opinion, R. p. 145.

In the case of *Johnson* v. *Ismert-Hincke Co.*, 116 Kans. 734, the Court said:

> "The Workmen's Compensation Law fixed the liability of an employer to his employee where both parties are under the law and this liability is founded upon the contract of employment and the statute. *The liability in no sense depends upon tort. It is a liability growing out of a contract, the terms of the statute being embodied in the contract.*"

The New Hampshire Supreme Court in the case of *Mulhall* v. *Company*, 80 N. H. 194, recognizes that the Workmen's Compensation Act of the state of employment enters into and becomes a part of the contract of employment, because in the *Mulhall* case at p. 200, the Court said:

> "'Neither employer nor workman, unless he so chooses, comes within the act. *When both so elect, the act becomes a part of the contract of employment.*' Hotel Bond Company's Appeal, 89 Conn. 143."

In the case of *Liberato* v. *Royer*, 270 U. S. 535, the Court, Holmes, J., said:

> "The compensation act offers a plan different from the common law, and the workman is free not to come in under it. If he does, of course all benefits dependent on the new arrangement are matters of agreement and statutory consequences of agreement, and cannot be carried further than the contract and statute go."

That the terms of the Workmen's Compensation Act of Vermont entered into and formed a part of the contract of employment between the parties is not seriously contested by the employee, but it is claimed that the Workmen's Compensation Act of Vermont is contrary to the public policy of New Hampshire because it differs in some of its terms and provisions from the New Hampshire Workmen's Compensation Act.

"But it by no means follows that because the statute of one state differs from the law of another state, therefore it would be held contrary to the public policy of the laws of the latter state. Every day our courts are enforcing rights under foreign contracts where the *lex loci contractus* and *lex fori* are altogether different, and yet we construe these contracts and enforce rights under them according to their force and effect under the laws of the state where made. To justify a court in refusing to enforce a right of action which accrued under the law of another state because against the public policy of our laws it must appear that it is against good morals or natural justice, or that for some other such reason the enforcement of it would be prejudicial to the general interests of our own citizens."

Northern Pacific Ry. Co. v. *Babcock*, 154 U. S. 190. Opinion, R. p. 142.

In the case of *New York City Railroad Company* v. *White*, 243 U. S. 188, 200, the Court said:

"This Court repeatedly has upheld the authority of the states to establish by legislation departures from the fellow servant rule and other common law rules affecting the employer's liability for personal injuries to the employee."

It is to be noted with interest that the majority opinion states no reasons nor cites any cases in support of its position.

If the case of *Saloshin, Admr.* v. *Houle*, 85 N. H. —, 155 Atl. 47, is cited as an authority in support of the Court's position, it is clearly inapplicable and not in point.

We are in accord with the analysis of the *Saloshin* case as made by Wilson, J., in his dissenting opinion, R. p. 149, , and contend that it is an authority for, rather than against the employer.

The Workmen's Compensation Act of Vermont differs from that of New Hampshire in that under the Vermont Act the employee must make his election to retain his common law rights when entering the employ of his master and prior to

receiving the injury, otherwise he [illegible] and is bound by, the provisions of [illegible] New Hampshire the employee had the right to elect before receiving the injury whether he will accept compensation or proceed at common law. In other words, said acts are alternative, the only difference being as to the time of making the election, but once the election is made, it is binding upon the employee to the exclusion of all other remedies.

It is because of this difference it is contended the Vermont act is contrary to the public policy of New Hampshire.

The term "public policy" has been judicially defined numerous times, but the majority of courts agree that under the rules of comity, contracts valid in the state where made will be enforced unless the agreement "is contrary to good morals of the state, or its citizens would be injured by its enforcement, or it perniciously violates positive written or unwritten prohibitory law."

For other definitions of "public policy," and its application to contracts, see *"Words & Phrases,"* Vol. 6, p. 382.

In the case of *Twin City Pipe Line Company* v. *Harding Glass Company*, 283 U. S. 353, the Court, Butler, J., said:

> "The general rule is that competent persons shall have the utmost liberty of contract, and that their agreements voluntarily and fairly made shall be held valid and enforced in the courts. *Printing Co.* v. *Sampson*, L. R. 19, Eq. 462, 465; *B. & O. S. W. Ry.* v. *Voigt*, 176 U. S. 498, 505. The meaning of the phrase 'public policy' is vague and variable; Courts have not defined it and there is no fixed rule by which to determine what contracts are repugnant to it. The principle that contracts in contravention of public policy are not enforceable should be applied with caution and only in cases plainly within the reasons on which that doctrine rests."

We respectfully submit that a careful analysis and comparison of the two acts will satisfy this Court that the Vermont act is not contrary to the public policy of New Hampshire.

"The mere fact that statutes of different states of the same general character differ in some feature does not render a contract entered into in one state and valid under its statute, unenforceable in another state because it does not conform to its statute. *Stevens* v. *Stevens*, 21 Fed. 299, 303; *Reynolds* v. *Day*, 9 Wash. 499, 502; *Herrick* v. *Minneapolis & St. L. R. Co.*, 31 Minn. 11; *Northern Pac.* v. *Babcock*, 154 U. S. 190; *Chicago & E. I. R. Co.* v. *Rouse*, 178 Ill. 132; *Higgins* v. *Central N. E. & W. R. Co.*, 155 Mass. 176, 180; *Dennick* v. *R. R. Co.*, 103 U. S. 11; *Barnhart* v. *Am. Concrete Steel Co.*, 227 N. Y. 531; *Schweitzer* v. *Hamburg-American Line*, 188 N. Y. S. 944; *Howard* v. *Howard*, N. Car. Sup. Ct., decided April 1st, 1931; *Bliss* v. *Houghton*, 16 N. H. 90, 91, 92; *Adams* v. *Gay*, 19 Vt. 358, 367; 2 *Kent* 117, 118."

Opinion, R. p. 151, 152.

It is the position of the employee that under the provisions of General Laws of New Hampshire, 1926, c. 178, he has the right to elect after the injury whether he will accept compensation or proceed at common law to recover damages for the injuries sustained. He claims that he is within his rights under the provisions of New Hampshire law when he elects to proceed at common law rather than to accept compensation. That the position of the employee is untenable and unsound is supported by numerous authorities.

"If the employee or his representative had also accepted the New Hampshire act and sought to enforce his rights under that act, the New Hampshire courts, in accordance with the most recent decisions, would have refused to award compensation under the New Hampshire act and referred her back to Vermont, where his contract of employment was made. *Pettiti* v. *Pardy Construction Co.*, 103 Conn. 101, 109; *Mesto* v. *Hitchings*, 198 N. Y. S. 610; *Schweitzer* v. *Hamburg American Line*, 188 N. Y. S. 944; *Barnhart* v. *American Concrete Co.*, 227 N. Y. 531; *Norman* v. *Hartman Furniture Co.*, 84 Ind. App. 173."

Opinion, R. p. 153.

Workmen's Compensation Acts in various states, the terms of which are almost identical with those in the case at bar,

have been considered by the [illegible] report of various states, and in no case has any [illegible] been held invalid as against public policy, or in [illegible] any constitutional provision on this ground.

Opinion of Justices, 209 Mass. 607, 619, 611;
Mackin v. *Co.*, 187 Mich. 8;
Amer. Radiator Co. v. *Rogge*, 86 N. J. L. 426;
Johnston v. *Corporation*, 248 Fed. 407;
Hopkins v. *Co.*, 99 Conn. 457, 460;
Cram v. *Riley*, 214 Mich. 218;
Industrial Commission v. *Ins. Co.*, 64 Col. 480;
Rounsaville v. *Co.*, 87 N. J. L. 371;
Pierce v. *Storage Co.*, 185 Ia. 1346;
Foughty v. *Ott*, 80 W. Va. 88;
Chambers v. *District Court*, 139 Minn. 205;
Anderson v. *Co.*, 169 Wis. 106;
Post v. *Berger & Gohlke*, 216 N. Y. 544;
Hosper v. *Hungerford Smith*, 230 N. Y. 616.

"It is now well-settled that compensation acts are not contrary to public policy, but are everywhere recognized as humane, economic, and in the interest of the employee and the general welfare of the state; and nowhere is this more admirably stated than in *Mulhall* v. *Nashua Mfg. Co.*, 80 N. H. 194. * * * In view of the declarations in *Mulhall* v. *Nashua Mfg. Co., supra*, we cannot conceive of the New Hampshire Court of last resort holding as a general proposition that a statute which has been adopted in so many states and acclaimed far and wide as one of the most beneficent acts of recent years in promoting the general welfare of the working man, is contrary to the general welfare of the citizens of New Hampshire."

Opinion, R. p. 139.

3. The Circuit Court erred in that the Court held that the contract of employment entered into in Vermont between the employer and employee was not a bar to the maintenance of a common law action in New Hampshire.

In the case of *Pritchard* v. *Norton*, 106 U. S. 124, the Court said:

> "The Circuit Court of the United States . . . . . in a cause . . . . . in which its jurisdiction depends on the citizenship of the parties adjudicates their rights precisely as would a tribunal of the state according to the laws of the state; so that, in that sense, there is no question as to what law must be administered. But in case of contract, the foreign law may by the act and will of the parties have become part of their agreement, and in enforcing this the law of the forum may find it necessary to give effect to a foreign law which without such adoption would have no force beyond its own deed. . . . . .
>
> "The principle is, that whatever relates merely to the remedy and constitutes part of the procedure is determined by the law of the forum, for matters of process must be uniform in the courts of the same country; but whatever goes to the substance of the obligation and affects the rights of the parties, as growing out of the contract itself or inhering in it or attaching to it, is governed by the law of the contract."

In accordance with the rule laid down in the *Pritchard* case, the compensation act of the State of Vermont, being a vital part of the contract of employment entered into between the employer and employee, must be considered in determining the rights and remedies of the parties in this action. Accordingly, by virtue of the contract of employment entered into between the parties in Vermont, which provides for the payment of compensation by the employer to the employee and which excludes "all other rights and remedies of such employee" (Vermont General Laws, p. 241, s. 5774), the employee is barred from maintaining a common law action against his employer to recover damages for injuries arising out of the employment.

> "As between employer and employee, the remedy provided by the Workmen's Compensation Act is exclusive."
>
> *Kennerson* v. *Thames Towboat Co.*, 89 Conn. 367, 371;

Powers v. *Hotel Road Company*, 89 Conn. 140, 147;
Hopkins v. *Metal Polish Co.*, 99 Conn. 457, 460;
Gooding v. *Ott*, 77 W. Va. 467;
Hunter v. *Co.*, 175 Iowa 245;
Denny v. *Co.*, 36 N. J. L. J. 121;
Industrial Commission v. *Ins. Commission*, 64 Col. 480;
Dettloff v. *Co.*, 195 Mich. 117;
Grinnell v. *Wilkinson*, 39 R. I. 447;
Barnhart v. *Co.*, 227 N. Y. 531;
Martin v. *Corp.*, 252 Fed. 207;
Shade v. *Co.*, 92 Kans. 146;
McRoberts v. *Co.*, 93 Kans. 364;
Moeser v. *Shunk*, 116 Kans. 247;
Johnson v. *Co.*, 116 Kans. 734;
Grant Smith Porter Ship Co. v. *Rohde*, 257 U. S. 469.

"In *Tennessee Coal Company* v. *George*, 233 U. S. 354, 359, the Court says, 'There are many cases where right and remedy are so united that the right can not be enforced except in the manner and before the tribunal designated by the act. For the rule is well settled that, "where the provision for the liability is coupled with a provision for a special remedy, that remedy and that alone, must be employed."' *Galveston Ry.* v. *Wallace*, 223 U. S. 481, 490, 32 S. Ct. 205; *Stewart* v. *B. & O. R. Co.*, 168 U. S. 445."

Texas Pipe Line Co. v. *Ware*, 15 Fed. 2nd, 171.
See also *Pollard* v. *Bailey*, 20 Wall. 520, 527; *National Bank* v. *Francklyn*, 120 U. S. 747, 753.

The *General Laws of New Hampshire*, 1926, in effect at the time the common law action was instituted in New Hampshire provided as follows, c. 178, s. 11:

"Remedy Suit at Law. The right of action for damages caused by any such injury at common law or under any

statute shall not be affected by this chapter; but in case the injured workman, or in event of his death, his executor or administrator, shall avail himself of this chapter either by accepting any compensation hereunder by giving the notice hereinafter prescribed, or by beginning proceedings therefor in any manner on account of any such injury, he shall be barred from recovery in every action at common law or under any other statute on account of the same injury."

By the provisions of the Vermont act, the employee is presumed to have accepted its terms in the absence of the filing of a declaration not to be bound by it. No such declaration was filed by the employee in the case at bar. It is to be noted further that the Vermont Workmen's Compensation Act contains the so called extra-territorial clause, and applies to injury arising outside of the State of Vermont, and of necessity covers the accident in question. It therefore follows that prior to the institution of the common law suit in New Hampshire, the employee had already accepted and was bound by the provisions of the Workmen's Compensation Act of Vermont, which, not only by its terms, but by the statute and decisions in New Hampshire, barred his estate from maintaining a common law action in New Hampshire.

"One who has accepted the provisions of the Workmen's Compensation Act is barred from maintaining a common law action for negligence to recover for the same injury."

Watts v. *Co.*, 79 N. H. 299;
Davis v. *Co.*, 82 N. H. 87.

In the case of *Dahn* v. *Davis*, 258 U. S. 421, the Supreme Court recognized the principal that one who has elected to accept and receive compensation for injuries arising out of his employment was thereby debarred from an action against the employer to recover damages for negligence causing the injury.

The Courts have repeatedly granted compensation in accordance with the provisions of the Workmen's Compensation

Act in the state where the contract of employment was made, even though the injuries were received outside the state of employment.

Smith v. *Van Noy Interstate Co.*, 150 Tenn. 25;
Zurich Co. v. *Industrial Commission of Wis.*, 213 N. W. 630;
Kennerson v. *Co.*, 89 Conn. 367;
Haulfroit v. *Escanaba Roofing Co.*, 188 N. W. 411;
Cram v. *Riley*, 214 Mich. 218;
Post v. *Berger-Gohlke*, 216 N. Y. 544.

A case directly on all fours with the case at bar is that of *Ora Scott* v. *White Eagle Oil & Refining Company*, District Court of the United States for the District of Kansas, decided February 3, 1930. In the *Scott* case the contract of employment was entered into in the State of Missouri, and was continued for a period of one year. At the time the contract was entered into, Missouri had a Workmen's Compensation Act similar to the Vermont Act. The injury to the plaintiff occurred in the State of Kansas while he was working for defendant under this contract of employment. At the time of the accident, the State of Kansas also had in force the Workmen's Compensation Law.

A common law action was instituted in Kansas to recover damages for the injuries sustained by the plaintiff, which he claimed were due to the defendant's negligence. The Workmen's Compensation Act of Missouri was pleaded as a bar to the maintenance of the common law action in Kansas.

The Court, in dismissing the action in Kansas, said:

"The Workmen's Compensation Law of the State of Missouri enters into and forms a part of every contract of employment made in that state, and entitles a workman under its terms to recover for an injury received even within or without the state. Such a contract, it has been many times held, goes with the workman wherever he goes. See *Cram* v. *Leonard Crossett & Riley*, 214 Mich. 218; *Grinnell* v. *Wil-*

Hinson, 39 R. I. 447; *State Ex rel Brewen-Clark Syrup Co. v. Missouri Workmen's Compensation Commission*, 59 A. L. R. 737; *Smith* v. *Van Noy Interstate Co.*, 262 S. W. 1042.

"This being true, as I conceive the law to be, plaintiff's right of action for compensation is in legal effect an action for the breach of his contract of employment with defendant as made, and is enforceable in any jurisdiction in which the plaintiff may acquire jurisdiction of the person of defendant, and the compensation assessed in such a case is assessed under the provisions of the law of the state of the contract. All a party in such a case is required to do is to bring his action and show, under his contract of employment, he received an injury and that he has complied with all the conditions precedent on his part to be complied with to avail himself of the protection of the law. It is thus seen the law of the place of contract governs the rights of the parties in this case for that they are bound by the terms of the contract. As further seen, this law is in its terms exclusive. It is contractual and may be enforced by plaintiff on performance of its conditions precedent to be performed in any court in which he may obtain jurisdiction over the person of the defendant. *This renders it clear plaintiff had at the time of his injury and at the time this action was brought, no common law right of action remaining which he can enforce as against the contract which he entered into.*"

New Hampshire is bounded on the east by Maine, on the south by Massachusetts, and on the west by Vermont. The compensation acts of the three states Maine, Massachusetts and Vermont are the same, and each contains the extra-territorial clause. The importance of the case at bar is appreciated when we take into consideration the fact that employees are constantly entering the State of New Hampshire in the course of their employment from these three states, and especially is this so where the employer's place of business adjoins or is near the boundary line. The Court will readily appreciate the force and effect of the contract entered into between the employer and employee in the state where the employee was hired which fixes the rights, liabilities and

remedies of each of the parties for accidents arising out of the employment.

In the case of *Kennerson v. Thames Towboat Company*, 89 Conn. 367, the Supreme Court of Connecticut construes the Connecticut act with reference to injuries sustained outside of the State of Connecticut. In that case the dependents of deceased claimed compensation under the Connecticut act for death resulting within the navigable waters of New Jersey. The contract of employment was made in Connecticut, and the services to be performed were to be performed partly within and partly without the state.

The principal point decided was whether or not the Connecticut statute had any extra-territorial effect, but the reasoning of the Court and its comment are argumentative and support the reasoning advanced in other cases. The Court said:

> "The remedy provided by our compensation act is substitutionary in character, furnishing what was purposed to be a more humanitarian and economical system as a substitute for one deemed wasteful to industrial enterprises and commerce, and unfair to employees. Its intent was to afford its protection to all Connecticut employers and employees who might voluntarily choose to make its provision for compensation for injury a part of their contracts of employment. . . . . It intended that the employee should know what compensation he or his dependents would receive in the event of injury, and that payment should be made speedily by a procedure at once simple and inexpensive. It intended that the employer should know his liability in this regard, and so might include it among the items charged to operation. If our act intends its contracts of employment to include compensation for injuries occurring only within our jurisdiction, it manifestly defeats its own ends. In that case the employer may not charge to the industry the compensation for injuries occurring without the State, and the employee or his dependents may not collect the same. Neither employer nor employee can know what portion of this period of employment will be subject to the provisions of the Act and no provision for insurance of this liability will be practically possible,

since it may not ordinarily be known what part of the service will be in and what part out of the State, or in what jurisdiction the service will be performed, in industries and commercial enterprises engaged in intrastate and interstate employment. The State boundary is not the limit of very many businesses. To subject them to the laws of the many jurisdictions in which they may be engaged will be especially burdensome to them, and involve them probably in greater expense and liability and far greater difficulties than under the old system. Equally hard will it prove to the employee since he must pursue his remedy in the State of the accident, or the federal court applying that State's law, and thus he may be brought under any one of many different compensation Acts, with whose provisions he cannot hope to be familiar, some Acts contractual in character, some compulsory, some optional, and some *ex delicto*, and he may find he has forfeited the benefit of the foreign Act through failure to comply with its provisions. A reading of the several Acts now in force convinces us that these difficulties are not imaginative, but imminent actualities."

Wilson, J., in his dissenting opinion, appreciated this situation because he said, R. p. 147,

"I cannot agree to the majority opinion that a Vermont contract of employment, both parties to which were domiciled in Vermont and accepted its Workmen's Compensation Act, will not be recognized as valid by this Court because it is against the public policy of New Hampshire where an injury occurred on the ground that it undertakes to relieve an employer from liability for future negligence. The case is one of new impression and owing to the peculiar nature of the New Hampshire Employers' Liability and Compensation Act, is unique in the issues it presents, *and of importance to employers, especially in adjoining states*, otherwise I should not deem it necessary to present my views at length."

The *Massachusetts Workmen's Compensation Act, General Laws*, c. 152, s. 26, has recently been amended by statute 1927, c. 309, s. 3, so as to apply to injuries received within the scope of employment outside of the state.

It will be noted that at the time the *Gould's Case*, 215 Mass. 480, was decided, which is now the minority rule, the Massachusetts act did not have the extra-territorial clause, but since the amendment above referred to, the Massachusetts Supreme Court has passed upon same and decided it in accordance with the majority rule, supported by the cases we have cited.

The case referred to is *Alphonse Pederzoli's Case*, decided January 3, 1930, 269 Mass. 550. In this case the plaintiff was hired in Massachusetts, and in the course of his employment, had occasion to do work in the State of New Hampshire, wherein he was injured, and a claim for compensation was made in Massachusetts for the injury which had been received in New Hampshire. In awarding him compensation in Massachusetts, the Court, Pierce, J., said:

> "We think General Laws, c. 152, s. 26, as amended by statute 1927, c. 309, s. 3, should be broadly construed; and that so interpreted, the intent of the legislature is unequivocal, plain and unmistakable that in circumstances like the present, an employee injured [outside of the state] in the performance of work which arose out of and in the course of his employment should have compensation under the Workmen's Compensation Act. See in this connection *Kennerson* v. *Thames Towboat Company*, 89 Conn. 367; *Grinnell* v. *Wilkinson*, 39 R. I. 447; *Cram* v. *Leonard Crosset & Riley*, 214 Mass. 218; *Post* v. *Berger-Gohlke*, 216 N. Y. 544."

The Workmen's Compensation Act of the State of Maine is very similar to the Vermont Act, and contains the extra-territorial clause. See *Maine General Laws*, 1921, c. 25.

The Maine Act has been construed by the Supreme Court of Maine in the *Saunders Case*, decided March 31, 1927, 126 Maine, 144.

In the *Saunders Case* the deceased, a resident of Maine, was employed by a Maine corporation which did business in Maine and the Province of New Brunswick; his employment contract contemplated his working in Maine and New Bruns-

wick, and in the course of his employment he was accidentally killed at St. Stephen in the Province of New Brunswick. Both employer and employee had accepted the Workmen's Compensation Act of Maine, the provisions of which were almost identical with those of the Vermont Act. Recovery was allowed in favor of the estate of the deceased under the provisions of section 25 of the Maine Workmen's Compensation Act. The Court, Wilson, C. J. (now a member of the Circuit Court of Appeals for the First Circuit, and the Justice who wrote the dissenting opinion in the case at bar), said:

> "It is true that even if the employment was made by the Maine Company in the first instance, in order for his dependents to recover, he must have remained in its employ while working on the Canadian side, and their recovery is by virtue of section 25 of the compensation act, although there appears to be a tendency in the later decisions where the acceptance of the act is contractual and not compulsory, to extend its operations extra-territorially without an express provision to that effect. *Smith* v. *Van Noy Interstate Co.*, 130 Tenn. 35."

4. The Circuit Court erred in that the Court held that the acceptance in New Hampshire by the employer of the Workmen's Compensation Act, Public Laws of New Hampshire, 1926, c. 178, was binding upon the parties in the case at bar to the exclusion of the rights of the parties under the provisions of the Vermont Workmen's Compensation Act.

The opinion of the Circuit Court of Appeals in the case at bar is based substantially upon the fact that the acceptance in New Hampshire by the employer of the New Hampshire Workmen's Compensation Act was binding upon the parties to the exclusion of their rights under the Vermont Act. As the Court, Anderson, J., said:

> "On rehearing, the attention of the Court is sharply directed to the fact that the defendant expressly accepted the

New Hampshire Workmen's Compensation Act, Public Laws of New Hampshire, c. 178. This act reserves in s. 11, to the employee or his legal representative, an action at law for damages on death caused by negligence. It is clear that this act applies to actions for negligence occurring in New Hampshire, and that its acceptance binds the defendant in this action of tort."

Opinion, R. p. 145.

In considering this phase of the case it is important that we should consider somewhat the facts of the case and its history leading up to the acceptance of the Workmen's Compensation Act in New Hampshire by defendant, and where that fact first appeared in connection with the trial of this case.

The defendant is a Vermont corporation with a principal place of business at Bradford, Vt., R. p. 66. It is engaged in the manufacturing and distribution of electric energy. The current is manufactured in Vermont and distributed by wires of the Company through certain sections of Vermont and across the boundary line into New Hampshire. In connection with its New Hampshire properties it of necessity had to employ New Hampshire help to operate in that state.

The plaintiff, Leon J. Clapper, was domiciled in, and a resident of, Vermont. The contract of hiring was made in Vermont. His employment required him to perform services within and without the State of Vermont.

At no time while in the employ of defendant had he ever resided in New Hampshire, and whenever he had any work to perform in New Hampshire, it was of a temporary nature and under the supervision and control of the Bradford office.

At the time he received the injuries complained of in this action, he was temporarily engaged in New Hampshire in performing work upon the defendant's Haverhill substation.

The case at bar was first filed in the state court by the plaintiff, Jennie M. Clapper, who was then a resident of New

Hampshire, in her capacity as administratrix of her brother's estate, R. p. 64.

The case was transferred to the United States District Court upon petition of the defendant by reason of the diversity of citizenship of the parties, R. p. 1.

When the case was filed in the District Court defendant filed an answer and brief statement setting forth therein for the first time the fact that plaintiff's decedent and defendant had accepted the provisions of, and were bound by, the Vermont Workmen's Compensation Act which was a bar to the maintenance of this action in New Hampshire, R. p. 7.

The plaintiff filed a Motion to Reject Defendant's Answer and Brief Statement, and assigned therein four reasons why same should be rejected, but it is important to note at this time and in this respect that plaintiff did not assign as a reason for defendant's answer being rejected that it had accepted the provisions of the New Hampshire Workmen's Compensation Act, R. p. 11.

The Court, in its rescript, denied defendant's motion to dismiss, granted plaintiff's motion to reject defendant's answer, and ordered defendant to go to trial by jury, R. p. 12 But again no reference is made to the acceptance of the Workmen's Compensation Act of New Hampshire by the defendant as a reason or basis for denying defendant's motion to dismiss.

The plaintiff's motion to reject defendant's answer was treated by the trial Court and counsel as a demurrer to defendant's answer and admitted the facts therein set forth. The Court, in its opinion, has so treated the motion. (Opinion, p. 135.)

The defendant's answer was complete in that it contained sufficient facts, if proved, to bar plaintiff's cause of action. By his demurrer, counsel for the plaintiff admitted all of the facts alleged by the defendant in its answer, and therefore obviated the necessity of proving same.

The Court in its rescript said:

"Actions under the Employer's Liability Act in New Hampshire are based on tort, not on contract, and the law of Vermont has no extra-territorial effect." R. p. 12.

By its ruling the Court eliminated the law of Vermont so far as it was applicable to this case, and ordered the defendant to go to trial under the law of New Hampshire.

Unfortunately, the rule in the Federal Court is such that legal problems arising during the course of the trial cannot be transferred to the Circuit Court of Appeals for judicial determination until a judgment has been rendered in the District Court. Were the law the same as in our State Court, upon the Court denying the defendant's motion to dismiss, and granting plaintiff's motion to reject, the case could immediately have been transferred to the Circuit Court upon defendant's exception to the Court's ruling, and the same proposition which is now before the Court would then have been presented for this Court's consideration, and the parties involved would have been saved the time and expense of three jury trials.

Furthermore, the acceptance of the New Hampshire Workmen's Compensation Act by the defendant would not then have been presented to this Court and the plaintiff would have been deprived of that comfort and support which she now attempts to receive from the fact that the defendant had accepted the New Hampshire Act.

Having been ordered to go to trial in New Hampshire in an action brought by the Administratrix of the Estate of an employee injured in New Hampshire, which action was brought under the Employer's Liability Act of New Hampshire, it was incumbent upon the defendant to protect its interests by every defense available to it under the New Hampshire law, and from then on the Vermont law was not available to the defendant as a defense, nor material in any way under the issues raised by the plaintiff.

As a part of the plaintiff's case it appeared that three men from Berlin, N. H., came down and assisted in the construction of the line from Pike, N. H., to Lake Tarleton, N. H.

These men were linemen and did the same kind of work as Clapper and the others in the construction and reconstruction of the line upon which the plaintiff subsequently was fatally injured, R. p. p. 60, 61, 83.

It appearing that the defendant had engaged New Hampshire employees to work in New Hampshire upon that type of hazardous employment which came within the definition of the statute, i.e., "the construction, operation, alteration or repair of wires or lines of wires, cables, switchboards, or apparatus charged with electricity" (N. H. Public Laws, 1926, c. 178, s. 1), it was incumbent upon the defendant, in order to avail itself of the defenses of assumption of risk and negligence of a fellow servant (Public Laws, c. 178, ss. 2, 3, 4), to prove that it had accepted the provisions of the New Hampshire Workmen's Compensation Act and that same were in force on the date of this accident.

> "In a servant's action for injuries caused by his master's negligence, the burden is on the latter to show that he has accepted the compensation provisions of the employer's liability act (Laws 1911, c. 163); in the absence of proof of such acceptance assumption of the risk is not a defense."
>
> *Spilene* v. *Company*, 79 N. H. 326.

Accordingly, and as a part of the defendant's case, before any evidence was introduced, the defendant offered to prove that it had accepted the provisions of the New Hampshire Workmen's Compensation Act, and that same were in effect on the date of the accident, but the plaintiff admitted the facts to be as stated in the offer and further proof became unnecessary, R. p. 66.

If there was any question on the part of the plaintiff that the defendant had accepted the Workmen's Compensation Act of New Hampshire for the benefit of others than its New Hampshire employees, it had the opportunity then and there to make further inquiry to elicit this information, but from the fact that the facts were admitted to be as offered by

defendant, it is apparent that it was obvious to plaintiff's counsel why the New Hampshire Act had been accepted by defendant.

And, indeed, it is perfectly apparent and obvious to anyone why defendant had accepted the New Hampshire Act. The evidence disclosed that the defendant's lines ran through and served the towns of Haverhill, Woodsville, Bath, Lisbon, Littleton and Bethlehem, all of which were in New Hampshire, R. p. 68.

Assume, for the purpose of argument, that one of the three men who came down from Berlin to assist in the construction of the line, R. p. 60, had been injured within the scope of his employment. Certainly it would have been no defense as to this injured employee for the defendant to assert and rely upon the acceptance by it of the Vermont Workmen's Compensation Act and not the New Hampshire Act. And why? Because the employee from Berlin was domiciled and resident in New Hampshire, the contract of employment with him was made in New Hampshire, and he was governed and controlled by the New Hampshire Act. It can not reasonably, logically and legally be contended that the Berlin employee and Clapper were in the same category and that their cases would be governed by the same Workmen's Compensation Acts.

As the Court said in the case at bar:

> "The defendant company accepted the New Hampshire Act, but neither the deceased nor his representative ever did. While the defendant's reasons for so doing were not disclosed by direct testimony, it appears in the record that its operations extended some distance into New Hampshire, and it perforce must at times, at least, have employed men in that State as well as in Vermont. If it wished to retain its common law defenses as to these men, it must accept the act."
>
> Opinion, p. 136.

Although plaintiff has cited several sections of the New

Hampshire Workmen's Compensation Act in support of his contentions and relies entirely upon the acceptance by the defendant of the New Hampshire Act as a basis for his right to maintain this action, the fact that the defendant had accepted the New Hampshire Act in no way controls or affects this action and furthermore, is not properly before this Court for consideration in passing upon the issues now involved.

The defendant is entitled to have this Court consider the question now involved upon the status of the record and pleadings at the time the Court handed down its Rescript denying defendant's motion to dismiss. As the defendant under the Federal procedure was prohibited from transferring its exception upon the record as it then stood, this Court should consider the exceptions in the order in which they were raised during the progress of the trial and upon the evidence and pleading introduced prior to the taking of the exception, not upon evidence which appeared subsequently in the trial and introduced in connection with an absolutely foreign matter to the issue now being considered.

For the reasons stated, the defendant contends that the fact that the defendant had or had not accepted the New Hampshire Workmen's Compensation Act at the time of the accident in question is not properly before this Court at the present time.

In the case of *Pickering* v. *Industrial Commission of Utah*, 59 Utah 35, the Court was considering the case on appeal from a decision of the Commission denying compensation to the employee under the law of Utah. The contract of employment was made in the State of Utah and the plaintiff had worked for the defendant in that state. The defendant secured a contract for the construction of a highway in the State of Colorado, and sent the plaintiff to Colorado to work as Superintendent of Construction. While in the performance of this work in Colorado, the plaintiff was injured.

The Supreme Court of Utah held that the Workmen's Compensation Act of Utah applied, even though the injury

occurred in the State of Colorado, *and even though the employer carried insurance covering injuries under the Compensation Act of the State of Colorado.*

In the case of *Zurich Accident & Liability Ins. Co.* v. *Industrial Commission of Wisconsin*, 213 N. W. 630, it appeared that the employer corporation was engaged in business in the State of Wisconsin. The President of the company was the "field man" and supervised the construction work of the company. The corporation obtained a contract to construct a bridge in Texas, and the President of the company supervised the construction of the bridge. The company obtained separate insurance covering liability under the Texas Workmen's Compensation Act.

While supervising the construction of the bridge in Texas, the President of the corporation was killed, and his widow applied to the Wisconsin Commission for a compensation award under the Wisconsin Act. The insurance company denied liability on the grounds that the injuries sustained were subject to compensation under the Texas Compensation Act, but not under the Wisconsin statutes. It took the position that the injury having occurred in Texas, the rights and remedies were governed by the Texas Compensation Act. The Supreme Court of Wisconsin held that the rights and remedies were governed by the Workmen's Compensation Act of Wisconsin and not by the Texas Act, and said:

> "Whether the deceased was under the Wisconsin or Texas Compensation Act depends upon whether his employment was pursuant to a Wisconsin or a Texas contract. On this question there can be no doubt. He went to Texas as a representative of the Company by virtue of his contract of employment made here in Wisconsin. So far as he was concerned, there was no Texas contract. The fact that he went to Texas, took charge of the work, hired and discharged men, and *secured workmen's compensation insurance in Texas*, did not make his employment a Texas employment, and he was at all times subject to the Workmen's Compensation Act no matter where he was performing services growing out of and

incidental to that employment. The conclusion that at the time of his death he was subject to the Wisconsin Compensation Act presents little difficulty."

A review of the above authorities should satisfy this Court that the acceptance in New Hampshire by the employer of the New Hampshire Workmen's Compensation Act does not bind the defendant in this action to the exclusion of the rights of the parties under the provisions of the Vermont Act.

5. The Circuit Court erred in that the Court held that when the Bradford Electric Light Company, Inc., invoked and defended under the Workmen's Compensation Act of New Hampshire, it then assented that the New Hampshire Statutes should alone govern the rights of the estate of Leon J. Glapner in the case at bar.

It is difficult to conceive how the Court can hold that when the defendant invoked and defended under the Workmen's Compensation Act of New Hampshire, it then assented that the New Hampshire statutes should alone govern the rights of the plaintiff in the case at bar.

The only contract of employment existing between the plaintiff and defendant is that which was entered into in the State of Vermont wherein both parties resided, and the terms and provisions of the Vermont Workmen's Compensation Act were embodied in and became an integral part of the contract of employment. The cases cited *supra* support the position of defendant that the parties to the contract of employment are bound by the exclusive features of the compensation act, and the Court's attention has already been called to the exclusive rights, remedies and liabilities provided for in the act. The New Hampshire Workmen's Compensation Act was intended for the benefit of residents of New Hampshire, or for the benefit of those persons whose contract of employment was entered into in New Hampshire.

As stated supra, the contract of employment between plaintiff and defendant was entered into in Vermont. No new con-

tract of employment was ever entered into between these parties in New Hampshire. Wilson, J., appreciated the significance of this situation because he said in his dissenting opinion, R. p. 148:

> "There was no new employment in New Hampshire of the deceased. There was no acceptance of the New Hampshire act by the deceased or his representative.
>
> * * * *
>
> "As the plaintiff saw fit to institute a suit under another New Hampshire statute, the acceptance of the New Hampshire compensation act by the defendant should not be construed as a waiver of any legitimate defense to the suit the defendant might have under the established rules of comity by virtue of a valid contract it had with the deceased."

It is true that the defendant had accepted the provisions of the Workmen's Compensation Act of the State of New Hampshire, but it was done for the protection of the defendant and for the benefit of those employees of defendant who were hired and resided in New Hampshire.

The contention of the plaintiff is that a common law action can be maintained in New Hampshire against this defendant for an accident which occurred in New Hampshire, regardless of the contract of employment entered into in Vermont which embodied the provisions of the Workmen's Compensation Act of Vermont, and defendant can not avail itself of any of the defenses under the Vermont Act.

The defendant's lines extended into New Hampshire, and it of necessity had to employ residents of that state.

The Court, Wilson, J., said, R. p 147:

> "The defendant had also accepted the New Hampshire compensation act c. 178, R. S., and complied with section 4. It is not really contended, however, that this was done because of the fact that some of its workmen living and employed in Vermont were also sent into New Hampshire to do service work, as it also appears that by reason of the exten-

sion of its lines into New Hampshire, it was at times, if not continually, obliged to employ residents of that state.

"Unless the fact that the defendant invoked and defended under the New Hampshire Employers' Liability and Compensation Act after the trial Judge ruled that the Vermont contract would not be recognized in New Hampshire must be construed as an assent that the New Hampshire statutes should alone govern the rights of the plaintiff's intestate in this case, the parties stand as though the Employers' Liability and Compensation Act of New Hampshire did not exist. The plaintiff brings this action under New Hampshire's Lord Campbell Act, and the defendant retains all its defenses at common law."

The principal issue in the case for the consideration of this Court is whether the trial court was in error when he "ruled that the Vermont contract would not be recognized in New Hampshire." If he was in error in so ruling, what the defendant by its counsel did thereafter as a matter of procedure is immaterial. Having ruled that the Vermont contract would not be recognized in New Hampshire, and having ordered the defendant to go to trial in New Hampshire under the common law, what could the defendant do but avail itself of every defense known to it until the error committed by the Court had been rectified? Counsel could not withdraw from the case at that stage and permit the case to go to the jury under the ruling made by the Court without presenting a defense.

As stated *supra*, the main issue in this case was raised by the pleadings, and what took place after the Court ruled that the contract would not be recognized in New Hampshire should not be confused with, or permitted to cloud, the issue clearly presented. The defendant should not be penalized for an error committed by the Trial Justice in erroneously holding that a valid contract entered into in Vermont between the parties would not be recognized or enforced in New Hampshire. The defendant never willingly, voluntarily or knowingly assented that the New Hampshire statutes should

alone govern the rights of the parties in the case at bar. Its only assent thereto is inferred from the fact that it invoked and defended under the Workmen's Compensation Act of New Hampshire, but in view of the manner in which the trial was conducted, it can not reasonably and fairly be said that the defendant ever intended to or did assent to the rights of the parties being governed by the New Hampshire Statute.

V.

CONCLUSION.

The plaintiff justifies his position in the place where he was injured by reason of a contract of employment existing between him and the defendant. No new contract of employment was made in New Hampshire, and therefore the plaintiff, at the time he was injured, was acting under and pursuant to the contract of employment entered into in Vermont. Courts have repeatedly held that Workmen's Compensation Acts of the elective type such as the Vermont Act entered into and became a part of the contract of employment. If it were not for the contract of employment existing between the plaintiff and defendant, the plaintiff at the time of receiving his injury would have been a trespasser and without right upon the defendant's property.

The very foundation of the plaintiff's whole case is the contract of employment entered into in Vermont. As the Court said in the case of *Atchison, Topeka & Santa Fe Railway* v. *Sowers*, 213 U. S. 55, 67,

> "It seems to us unjust to allow a plaintiff to come here absolutely depending on the foreign law for the foundation of his case, and yet to deny the defendant the benefit of whatever limitations on his liability that law would impose."

Accordingly, if the plaintiff intends to benefit by the Vermont contract of employment as the foundation for his case, he should accept as a part thereof and be bound by the bur-

dens as well as the benefits which go with the contract.

"We are of the opinion that there is nothing in the contract entered into between these parties in Vermont that is contrary to the main purpose of the New Hampshire act, or inimical to the welfare of its citizens, and according to the trend of recent decisions in other jurisdictions, the contract of hire under the Vermont act upon the principles of comity contains a good defense to an action under the New Hampshire death statute, there having been no contract of hire in New Hampshire."

Opinion, R. p. 144.

Wilson, J., in his dissenting opinion used the following language:

"I desire particularly to go on record as opposed to the ruling of the majority opinion that New Hampshire will not recognize a contract of employment under the Workmen's Compensation Act of another state that requires the assent of the workman before an injury to entitle him to its benefits on the ground that it is contrary to the public policy of New Hampshire. The New Hampshire Court has never so declared, and we can not conceive of any court holding that a statute so generally held to be conceived in the interest of the working man was inconsistent with the welfare of the citizens of New Hampshire. See *Mulhall* v. *Mfg. Co.*, 80 N. H. 194.

* * * *

"I am firmly of the opinion that there is nothing in the contract entered into between these parties in Vermont that is contrary to the purpose of the New Hampshire Compensation Act as defined by the Court of that state in *Mulhall* v. *Nashua Mfg. Co.*, 80 N. H. 194, or inimical to the welfare of its citizens and the public policy of that state; and according to the trend of the decisions in other jurisdictions, the rights of the parties should have been held to be governed by the Vermont contract, which provided for the plaintiffs only an exclusive relief for the death of her intestate."

Opinion, R. pp. 148, 152.

We respectfully submit that a careful review and consideration of the authorities cited herein will satisfy this Court that the judgment rendered by the Circuit Court of Appeals should be reversed.

The defendant desires to be heard orally.

Respectfully submitted,

BRADFORD ELECTRIC LIGHT COMPANY, INC.,

By WILLIAM E. LEAHY,
GEORGE T. HUGHES,
STANLEY M. BURNS,

Counsel for Petitioner.

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Brief for Respondent

The action for which review is sought was brought by the respondent, Jennie M. Clapper, as administratrix of the estate of Leon J. Clapper, in the Superior Court for Hillsborough County, against the Bradford Electric Light Company, Inc. to recover damages for the death of her intestate alleged to have been caused by the negligence of the petitioner. The case was removed by the petitioner to the District Court, the ground for removal being diversity of citizenship. (*R.* 4). The petitioner pleaded the general issue and filed a brief statement, alleging as a bar to the action a contract based upon the Compensation Act of Vermont. (*R.* 21). The respondent filed a motion to reject the brief statement and this motion was granted subject to the petitioner's exception. (*R.* 25). The case was three times tried by jury. At the last trial, a verdict was returned for the respondent on which judgment was entered. This judgment was affirmed by the Court of Appeals, Wilson, J. dissenting.

The petitioning corporation is a public utility organized under the laws of the state of Vermont, and engaged in business in both New Hampshire and Vermont. The respondent's intestate, Leon J. Clapper, was a resident of Vermont. He was employed by the petitioner to do work in either state as circumstances might require. On July 30, 1926, in the course of his employment, he was electrocuted at the petitioner's substation at Haverhill, N. H., because of the petitioner's failure to install and maintain a suitable disconnecting switch. (*R.* 81-233-238).

At the trial the petitioner offered to prove that it had accepted the compensation provisions of the Employers' Liability and Workmen's Compensation Act of New Hampshire. Formal proof was waived and it was conceded that the petitioner had accepted the act. (*R.* 203). The employers' liability provisions of the act abolish the defence of assumption of risk and fellow service. Secs. 2, 3, Ch. 178, P. L. By accepting the compensation provisions, the employer is relieved from the enlarged common law liability. The section relating to acceptance is as follows:

> "The provisions of sections 2 and 3 shall not apply to any employer who shall have filed with the commissioner of labor his declaration in writing that he accepts the provisions of this chapter as contained in the succeeding sections, and who shall have satisfied the commissioner of his financial ability to comply with its provisions; or who shall have filed with the commissioner a bond, in such form and amount as the commissioner may prescribe, conditioned on the discharge by such employer of all liability incurred under this chapter. Such employer shall thereafter be liable to all workmen engaged in any of the employments specified in section 1 for any injury arising out of and in the course of their employment, in the manner provided in the following sections." Sec. 4, Ch. 178, P. L.

But the compensation provisions expressly reserve to the employee his right of action for damages "at common law or under any statute". The employee may elect after injury whether to take compensation or to bring

his suit for damages. In this respect, the provisions of the New Hampshire law are unique, having no parallel among the other compensation acts. The other compensation acts seek to make compensation the exclusive remedy. See Bulletin No. 496, U. S. Labor Statistics. They either provide for election before injury or provide directly that the compensation shall be exclusive. Section 11, ch. 178, P. L., which preserves the right to recover damages, is as follows:

> "The right of action for damages caused by any such injury, at common law or under any statute, shall not be affected by this chapter; but in case the injured workman, or in event of his death his executor or administrator, shall avail himself of this chapter, either by accepting any compensation hereunder, by giving the notice hereinafter prescribed, or by beginning proceedings therefor in any manner on account of any such injury, he shall be barred from recovery in every action at common law or under any other statute on account of the same injury."

The petitioner by setting up its acceptance of the compensation provisions had the benefit at the trial of the common law defences of assumption of risk and fellow service, which otherwise would not have been available to it. Secs. 2, 3 and 4, ch. 178, P. L.

THE PETITIONER IS NOT ENTITLED TO CERTIORARI.

The petitioner has taken an appeal from the decision of the Circuit Court of Appeals, which appeal has been entered in this Court. The appeal is taken in pursuance

of Div. (b), sec. 347, Title 28, U. S. Code, which is as follows:

> "(b) Any case in a circuit court of appeals where is drawn in question the validity of a statute of any State, on the grounds of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is against its validity, may, at the election of the party relying on such State statute, be taken to the Supreme Court for review on writ of error or appeal; *but in that event a review on certiorari shall not be allowed at the instance of such party,* and the review on such writ of error or appeal shall be restricted to an examination and decision of the Federal questions presented in the case."

Having taken an appeal, the petitioner is not entitled to maintain this petition for certiorari. Moreover, no question of peculiar gravity or of general importance is presented by the petition. The questions relate to the interpretation of the statutes and laws of New Hampshire. They are peculiarly matters for the Supreme Court of New Hampshire. The Employers Liability and Workmen's Compensation Act of New Hampshire has been in effect since 1911. In nearly twenty years no similar question has been presented for determination. The circumstances do not warrant the claim that the issues presented are of general importance. Moreover, the action was brought in the state court and removed by the petitioners to the district court. In removing the action to the district court, the petitioner waived its right to have these issues determined by the New Hampshire Supreme Court, whose interpretation of the statutes of New Hampshire is authoritative and final. In *American Mutual Liability Ins. Co.* v. *McCaffrey et al.* 37 Fed.

(2d) 870, a similar case, certiorari was denied. *American Mutual Liability Ins. Co.* v. *McCaffrey*, 281 U. S. 751.

A CONTRACT INTENDED TO EXEMPT THE EMPLOYER FROM LIABILITY FOR NEGLIGENCE IS AGAINST THE PUBLIC POLICY OF NEW HAMPSHIRE AND INVALID.

The principal questions presented by this petition relate to the effect to be given in New Hampshire to the alleged contract based upon the Compensation Act of Vermont. The petitioner maintains that the contract as set out in its brief statement of defense is a complete bar to this action for the death of respondent's intestate occurring while employed in New Hampshire. The respondent's motion to reject the brief statement being in the nature of a demurrer admitted the averments of fact contained in the brief statement. But the case is to be determined upon the entire record. The judgment for respondent may not be vacated if upon examination of the entire record the judgment appears to have been properly entered.

> "On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court without regard to technical errors, defects or exceptions which do not affect the substantial rights of the parties." Title 28, Sect. 391, U. S. Code.
>
> "But this court sits in review of final judgments, not of opinions and, if the judgment itself is conceded to be correct, we cannot and will not inquire

into the reasons assigned therefor." *U. S.* v. *Heinrich,* 16 Fed. 2d. 112.

"The appellee may . . . urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it." *U. S.* v. *Am. Ry. Exp. Co.,* 265 U. S. 425, 435.

At the outset, we are confronted by petitioner's attempt to avoid the consequences of its acceptance of the compensation provisions of the New Hampshire act. The petitioner, in setting up its acceptance of the compensation provisions of the New Hampshire act, took a position inconsistent with its brief statement. At the trial the petitioner claimed that the rights of the parties were controlled by the acceptance and its contention became the law of the trial. By proving its acceptance of the compensation provisions, the petitioner had the benefit of the defenses of assumed risk and fellow service. (*R.* 203-300), which otherwise would not have been available to it. Secs. 2 and 3, ch. 178, P. L. Having set up its acceptance of compensation and obtained the benefit of it in this action, the petitioner ought not to be heard to assert that the acceptance did not extend to the respondent's intestate when electrocuted. The legal consequences naturally attaching to the petitioner's acceptance are not enlarged, if the petitioner is held to the law of the trial. The acceptance was unlimited. It included all of the petitioner's employees, (*R.* 203). In accepting the compensation provisions, the petitioner agreed "thereafter (to) be liable to all workmen engaged in any of the em-

ployments specified in section 1 for any injury arising out of and in the course of their employment, in the manner provided in the following sections." Sec. 4, ch. 178, P. L.

The respondent's action was brought in pursuance of and "in the manner provided in the following sections." Sec. 11, ch. 178, P. L. Consequently, the petitioner's acceptance of the compensation provisions of the New Hampshire act was necessarily an important factor in determining the rights of the parties. In deciding the case, the Court of Appeals said, Anderson, J.:

> "On rehearing, the attention of the court is sharply directed to the fact that the defendant expressly accepted the New Hampshire Workman's Compensation Act,—P. L. N. H. c. 178. This Act reserves, in section 11, to the employee or his legal representative, an action at law for damages or death caused by negligence. It is clear that this Act applies to actions for negligence occurring in New Hampshire, and that its acceptance binds the defendant in this action of tort. We are also satisfied that we were in error in our previous holding; and that no contract made in Vermont purporting to release an employer from liability for future negligence can bar an action brought in New Hampshire for an injury there sustained and thus change the public policy of New Hampshire. See *Saloshin, Adm'x,* v. *Houle* (N. H.), decided May 5, 1931. It follows that on both grounds the former decision of this court must be reversed." (*R.* 374).

In sustaining the respondent's motion to reject the brief statement, the district court, Morris, J. held that

"actions under the Employers Liability Act of New Hampshire are based on tort not on contract and the law of Vermont has no extra-territorial effect". (*R.* 26). In holding that the common law liability of the employer had not been abrogated, proper consideration was given to the history and development of the local system for the protection of employees from the consequences of industrial accidents. The general policy as to the application and enforcement of foreign law in redressing local wrongs was recently declared by the Supreme Court of New Hampshire in *Saloshin* v. *Houle;* 85 N. H.—; 155, Atl. 47.

> "It is sought by the transfer of the case to have it here determined what effect the plaintiff's acceptance of compensation in New York had upon the action. The answer depends, first, upon the policy of comity in enforcing the laws of other states, and second, if comity may be invoked, upon the New York law relating to and regulating compensation. As the record is understood, the plaintiff as the decedent's widow is the sole beneficiary of the action under P. L. c. 302, s. 14, II. It does not appear that there are minor or dependent children to share with her in any recovery. However the New York law is to be conconstrued, comity in its recognition and enforcement would not go so far as to permit it to defeat local law. Conduct of the plaintiff which sought to divest beneficiaries of their interest without their consent and enured solely to her benefit would be regarded as illegal here. A legal character of the conduct in the state of the domicile will be given no effect here

when to do so tends to alter the local law. Local jurisdiction over the action gives jurisdiction over its proceeds, and hence over their disposal. Nor may the New York law give the insurer any right of action, independent of that of the plaintiff, which may be enforced here. That law may not displace or modify the local law in its effect upon local occurrences and transactions. As to them, the local law will recognize no liability except that which it itself imposes. Otherwise local sovereignty would be impaired. It follows that if the New York law might be construed as giving the insurer a right of action of its own distinct from that of the plaintiff, it could not be maintained here. And it also follows that the amount of recovery in the local action cannot be affected by foreign law. The rule of damages is no less immune to change than that of liability. But since the plaintiff was personally subject to the laws of New York, her conduct pursuant thereto is to be recognized here so far as local laws and policy are not disregarded."

At common law, contracts intended to relieve the employer from liability for future negligence, are invalid. *Piper* v. *Railroad*, 75 N. H. 228, 485; *Johnston* v. *Fargo*, 184 N. Y., 379. The reasonableness of the consideration did not enter into the determination of the legality of such agreements. Accordingly, the benefit systems applying the compensation principle were held valid only if they preserved to the employee after injury "the right to elect whether he will sue his employer or accept benefits from the association." *Chicago B. & Q. R. Co.* v. *Miller*, 76

Fed. 439; see also *Day* v. *Atlantic Coast Line Co.* 179 Fed. 26; *Johnson* v. *Philadelphia & Reading R. R.*, 163 Pa. 127; *Otis* v. *Pennsylvania*, 71 Fed. 136.

In Labatt's Master and Servant, the law is summarized as follows:

> "1921. Contracts requiring servant to elect between acceptance of benefits out of a relief fund, and a prosecution of his claims in an action for damages. Generally. The courts in the United States are virtually unanimous in asserting the illegality of agreements by which servants consent to an absolute renunciation of their right to enforce the common law or statutory liability of their masters. On the other hand, there is in that country a concurrence of opinion, not less general, with respect to the doctrine that agreements which in substance involve merely a conditional or provisional renunciation of that right are valid. * * *
>
> "The rationale of the doctrine which asserts the validity of such stipulations is that the servant's potential right to sue for damages remains intact until the event which would entitle him to exercise it has actually occurred, and that it is then still open to him to elect whether he will bring an action, or accept the benefits in discharge of the employer's liability to him."

And in *Twaits* v. *Pennsylvania R. R. Co.*, 77 N. J. Eq. 103, the law was stated as follows:

> ". . . The law forbids and therefore treats as invalid a contract between an employer and employee which

absolves the employer from responsibility for his own negligence. This contract entered into between Twaits, an employe of the Pennsylvania R. R. Co. and the relief department, would come under this ban and be invalid were it not for the fact that after the accident the employe is left free either to sue the company or accept the benefits accruing to him by reason of his membership in the relief department.

"Such is the construction placed upon this contract by our own and many other courts."

And in respect to the liability imposed by the compensation acts, the same rule has been established.

In *International Coal & Mining Co.* v. *Industrial Commission,* 293 Ill., 524, 530 the court declared the rule as follows:

"It is well settled in this state that an employer cannot relieve himself of liability under the Workmen's Compensation Act by a contract with his employee. *Tribune Co.* v. *Industrial Commission,* 290 Ill. 402, 125 N. E. 351; *Chicago R. Co.* v. *Industrial Bd.* 276 Ill. 112, 114 N. E. 534; *Wabash R. Co.* v. *Industrial Commission,* 286 Ill. 194, 121 N. E. 569. What was said in these cases with reference to an employer relieving himself in toto from liability under the Workmen's Compensation Act applies with equal force here, where it is sought by the employer to relieve himself partially from said liability. It was said by this court in the Wabash R. Co. Case, supra: 'Plaintiff in error was operating under the act, and any settlement or agreement made with an injured employee must be considered as having been

made under the act, whether so expressly stated or not. It is contrary to the policy of the act to allow an employer, while choosing to come under its provisions by not filing an election in writing to the contrary, to relieve himself from liability under the act by private agreement or contract with the employee.'"

Among the first of the compensation laws to be enacted was that of New Hampshire. It adopted rudimentary principles and recognized the legal tests applied to the benefit systems by giving to the employee the right to elect after injury whether to bring his action for damages or to accept compensation. *Gordon* v. *Company* 83 N. H., 221. Consequently, the statute takes nothing from the common law rights of the employee. On the contrary, in expressly guaranteeing to the employee his right to bring his action for damages the rules of the common law were reaffirmed. Among them was the rule that any contract or agreement exempting the employer from liability is invalid.

It is claimed that the alleged contract based on the Vermont compensation act being valid where made ought to be enforced in New Hampshire. In determining whether such a contract ought to be enforced in New Hampshire, a fair test is to inquire whether such a contract if made in New Hampshire would be valid. It is plain that such a contract if made in New Hampshire would not be enforcible. *Piper* v. *Railroad*, supra. *Conn.* v. *Company*, 79 N. H. 450; *Weesmann* v. *Railroad*, 84 N. H.—; 152 Atl. 476.

No principle of comity requires the enforcement of a

contract which is against the public policy of the state where the contract is to be performed.

The New Hampshire Employers' Liability and Workmen's Compensation Act applies to certain hazardous employments. It applies to all employees and all employers engaged in those employments. No distinction based upon the place of hire is recognized. The purpose of this legislation is preventative as well as remedial. The enlarged liability has a tendency to reduce industrial accidents. If the employee were permitted by contract to exempt the employer from his liability for negligence, this purpose might be defeated. The situation is similar to that arising under the federal laws relating to the safety of employees of railroads. Contracts intended to relieve the railroad from the obligations imposed by these laws have been regarded as against public policy. In a leading case, *Philadelphia, B. & W. Railroad Co.* v. *Schubert*, 224 U. S. 603, the court (Mr. Justice Hughes) said:

> "In speaking of the Act in question, this court said that 'the natural tendency of the changes described is to impel the carriers to avoid or prevent the negligent acts and omissions which are made the bases of the rights of recovery which the statute creates and defines; and, as whatever makes for that end tends to promote the safety of the employees and to advance the commerce in which they are engaged,' there was no doubt that 'in making those changes Congress acted within the limits of the discretion confided to it by the Constitution'. Second Employers' Liability Cases, supra, p. 50. (223 U. S. 51, 32 Sup. Ct. Rep. 175, 56 L. Ed. 169). If Congress

may compel the use of safety appliances (*Johnson* v. *Southern Pac. Co.*, 196 U. S. 1, 17 Am. Reg. Rep. 412, 25 Sup. Ct. 158, 49 L. Ed. 363), or fix the hours of service of employees (*Balt. & O. R. R. Co.* v. *Interstate Commerce Commission*, 221 U. S. 612, 31 Sup. Ct. 621, 55 L. Ed. 878), its declared will, within its domain, is not to be thwarted by any previous stipulation to dispense with the one or to extend the other. And so, when it decides to protect the safety of employees by establishing rules of liability of carriers for injuries sustained in the course of their service, it may make the rules uniformly effective. These principles, and the authorities which sustain them, have been so lately reviewed by this court that extended discussion is unnecessary. *Louisville & Nashville R. Co.* v. *Mottley*, 219 U. S. 467, 55 L. Ed. 297, 34 L. R. A. (N. S.) 671, 31 Sup. Ct. 265." See also *Chicago & Alton R. Co.* v. *Wagner*, 239 U. S. 452.

For similar reasons the attempts to extend state compensation laws to accidents subject to maritime law have failed. In *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, it was held that the compensation law of New York was as to maritime accidents, invalid. The court said:

"And plainly, we think, no such legislation is valid if it contravenes the essential purpose expressed by an act of Congress, or works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations. This limitation, at the least, is essential

to the effective operation of the fundamental purposes for which such law was incorporated into our national laws by the Constitution itself."

See also: *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149.

The respondent's action sounds in tort. It is well settled that actions for tortious wrongs are controlled by the law of the place of injury. Gould's case, 215 Mass. 480. The laws of New Hampshire provide that the employer shall respond in damages for negligence causing the death of his employee. The contract based upon the laws of Vermont offered as a bar is opposed to the law as declared by the Supreme Court of New Hampshire (*Piper* v. *Railroad*, supra) and reaffirmed by its legislature. The ruling rejecting the brief statement was based upon a clear appreciation of the law and policy of New Hampshire.

Among the numerous cases cited by the petitioner, *Barnhart* v. *American Concrete Steel Company*, 227 N. Y. 531, alone presents a comparable situation. In that case the plaintiff's intestate and the defendant were both domiciled in New Jersey and subject to the provisions of its Compensation Act. The plaintiff's intestate was killed in New York. There was no evidence that the defendant had localized its business in New York. The Constitution of New York had then been amended to permit compulsory workmen's compensation. Consequently, the court held that the rights of the parties were controlled by the compensation law of New Jersey. The result would probably have been quite different but for the changes in policy introduced by the amendment to the

Constitution. *Johnston* v. *Fargo*, 184 N. Y. 379. And cases from jurisdictions where the common law action has virtually been abrogated by the Compensation Acts are of no real value because in New Hampshire the common law action has been preserved.

THE ALLEGED CONTRACT BASED UPON THE VERMONT ACT WAS SUPERSEDED BY AN AGREEMENT BASED UPON THE LAWS OF NEW HAMPSHIRE.

Even if the alleged contract, based upon the Vermont Compensation Act, were valid in New Hampshire, there still remains the question whether the contract may not have been superseded by a new agreement. In Vermont, the provisions of the Compensation Act were made a part of the contract of hiring, unless the employer or employee gave written notice that its provisions were not to apply. (*R.* 22). But the laws of Vermont can have no extra-territorial effect. In New Hampshire the parties were free to modify this contract. The petitioner maintained a large portion of its distribution system in New Hampshire and might properly bring its men when at work there under local law. The petitioner, by written declaration, accepted the compensation provisions of the Employers Liability and Compensation Act of New Hampshire. "Such employer shall thereafter be liable to all workmen engaged in any of the employments specified in Sect. 1 for any injury arising out of and in the course of their employments in the manner provided in the following sections:" Sect. 4, Chap. 178, P. L. The respondent's intestate when injured was engaged in one of the specified employments. This action is brought by re-

spondent as authorized by "the following sections". See Sects. 11, 12, Chap. 178, P. L.

The petitioner's acceptance, at the least, was an offer to its employees injured in New Hampshire to pay compensation or to respond in damages according to the provisions of the Compensation Act. This offer was accepted by the respondent. The election of both parties to have their rights determined by the laws of New Hampshire, constituted an agreement superseding the alleged contract, based upon the Compensation Act of Vermont. The parties omitted no act necessary to have their rights determined by the Laws of New Hampshire.

If application of the local law under circumstances similar to those disclosed by the present case is to be denied, there will be much confusion and uncertainty injected into an important branch of the law. The petitioner did everything required by the law of New Hampshire to bring its men at work within the state under the provisions of the New Hampshire Compensation Act. The rule asserted by the petitioner would deny to an employer doing business in two or more states, the right to localize his business and establish a uniform rule of liability in each state. For instance, if an employer doing business principally in Vermont should undertake highway or other construction work in New Hampshire, and should take his workmen from Vermont to New Hampshire, the rights of the parties, in the event of injury, would be determined according to the law of Vermont, even though the employer accepted the provisions of the New Hampshire Compensation Act and insured his workmen thereunder. Such results are opposed to sound policy

and the great weight of authority. The theory that the compensation law of the place of hire determines the rights of parties must not be extended so far as to deny the employer and employee the right to modify the contract when the parties enter another jurisdiction. Moreover, it is not the contract of hire, but the relation arising therefrom upon which the law should operate. The obligation to pay compensation arises out of the relation of master and servant rather than out of the contract by which that relation is created. The relation is brought into existence from day to day as the service is performed. Consequently, when the employer and employee both enter another state, there is no sound reason why the law there should not determine the obligations arising out of the relation of master and servant.

In *American Radiator Co.* v. *Rogge*, 86 N. J. L. 436, it appeared that Rogge was employed in New York and injured in New Jersey. It was held that the rights of the parties must be determined according to the law of the place of injury. The court said:

> "The liability of the employer to make compensation is an obligation superimposed upon the original contract as a condition of its performance in New Jersey, and it is contractual in character because either party may escape the obligation by giving notice that he will not be bound thereby, and because it does not arise out of any wrongdoing. But the addition of this contractual obligation by statute does not affect the contract of hiring; that is still enforced as far as it goes by its terms.

In *Douthwright* v. *Champlin*, 91 Conn. 524, an action to recover compensation, it appeared that the contract of hire was made in Massachusetts and the claimant was injured in Connecticut. The court held that the Connecticut Compensation Act applied and said:

> "The express acceptance of our Act by these parties added its compensation features to their contract. In the absence of their refusal, the law would have added this to their contract; in either case it would have become a part of the contract."

In *American Mut. Liability Ins. Co.* v. *McCaffrey et al.* 37 Fed. (2d) 870, certiorari denied, 281 U. S. 751, it appeared that the Chattanooga Boiler & Tank Company was a Tennessee corporation engaged in the manufacture of tanks used by oil companies. It undertook to erect a tank in Texas. McCaffrey was employed in Tennessee. He was sent to Texas to assist in the erection of the tank and while there injured. The Tank Company accepted the provisions of the compensation act of Texas by becoming a subscriber for insurance. In holding that the case was controlled by the Texas compensation act the court said:

> "In view of what plaintiff alleges as to the time and place of his employment, the admission with respect to his employer having become a subscriber for insurance under the statute, and the defendant insurance company having assumed the liability plus the showing that the claim was made and prosecuted before the Industrial Board, we think it conclusively established that he comes under the Texas law."

In *Carl Hagenback & Great Wallace Show Co.* v. *Randall*, 75 Ind. App. 417, 126 N. E. 501, it appeared that one, Randall, was employed in Ohio by a written agreement. The agreement provided that "all matters whether sounding or in tort, relating to its validity, construction, and interpretation be determined" according to the laws of the District of Columbia. Randall was killed in Indiana and his mother filed a petition for compensation. In holding that the rights of the parties must be determined by the law of Indiana the court said:

> "The Workmen's Compensation Act of this state (sections 2-4, 15, Acts 1915) specifically provides that every employer in the state is presumed to have accepted the provisions of the act, and to have agreed to be bound thereby, unless such employer, 30 days before the accident resulting in injury or death, shall have given notice of exemption, and that no contract can operate to relieve any employer of any obligation created by the act. It is not contended that appellant gave the required notice, or any notice whatever. Appellant's show and show train were brought into Indiana, and appellant's business was being conducted in Indiana, just as had been contemplated by the parties at the time the employment contract in question was executed, and Randall, at the time of his death, was in the line of his employment as provided by such contract. Under such circumstances the public policy of Indiana as established by her compensation law did not give way because the contract of employment had been made in Ohio. Appellant's obligation under the Indiana act was super-

imposed upon the Ohio contract as a condition of its performance in this state. Appellant could not relieve itself of the statutory obligation by a foreign contract. The one way of exemption was by notice as provided by the Act."

See also:

Smith v. *Heine Safety Boiler Co.*, 119 Me. 552.

Ocean Accident & Guarantee Corp. v. *Industrial Commission*, 32 Ariz. 265.

Johnson v. *Nelson*, 128 Minn. 158.

Mitchell v. *St. Louis Smelting & Refining Co.*, 202 Mo. Ap. 251.

Ginsburg v. *Byers*, 171 Minn. 366.

Of course unanimity among the authorities is lacking, but many of the cases are distinguishable because of essential differences in the facts. The rule enunciated in the foregoing cases applies only when the employer is doing business within the state. The qualification of the rule appears in the case of *Norman* v. *Hartman Furniture and Carpet Company*, 84 Ind. Ap. 173. There one Norman was a buyer employed by the defendant, a corporation under the laws of Illinois and having its principal place of business at Chicago and carrying on no business in Indiana. Norman, in the course of his employment was killed in an automobile accident in Indiana. In holding that the widow's claim did not come within the Indiana Compensation Act the court said:

"Appellant has filed an able and exhaustive brief, and claims that on the authority of *Darsch* v. *Thearle Duffield, etc., Co.* (1922), 77 Ind. App. 357, 133

N. E. 525, the award should be reversed. In the case cited, the facts were: That both parties were residents of the State of Illinois; that the contract of employment between the parties was entered into in the State of Illinois; that appellant was an Illinois corporation and had no office or place of business in the State of Indiana; that at the time of the injury the employee was only temporarily in Indiana, and the court there affirmed an award dismissing the claim for want of jurisdiction. We adhere to that decision.

"In the instant case the agreed statement of facts shows that appellant and appellee were residents of Chicago, Illinois, and that the contract of employment was entered into in Illinois; that appellee had not localized in Indiana, and that Ralleigh H. Norman, at the time of his injury and death, was in Indiana, temporarily engaged in his master's business."

The Indiana decisions go far toward solving the difficult problems presented by this phase of the conflict of laws. Under the Indiana decisions a non-resident employer entering the state to do business is regarded as an Indiana employer when he has localized his business and taken the steps necessary to bring his workmen under the compensation act. Under these circumstances, the place of hire is regarded as immaterial and the rights of the employee injured in the course of the business are determined by the law of the place where the injury occurred. In such situation under the contract theory it may fairly be held that the parties have evinced a purpose

to have their rights determined according to the law of the place where the work is being done. But where the employer has no place of business in Indiana and his employee is merely casually there, then the Indiana Compensation Act is held not to apply. Here, according to the contract theory, there is no basis for holding that the parties have adopted the law of the place of injury.

If the present case is controlled by the contract theory no element is lacking to establish the respondent's right to maintain the present action. The petitioner having a localized business in New Hampshire, by written declaration accepted the compensation provisions of the Employers Liability and Workmen's Compensation Law. This was an unequivocal declaration of a purpose to compensate employees injured in New Hampshire in accordance with those provisions. The injury and the death of respondent's intestate occurred in an employment subject to those provisions and the respondent has elected to bring this suit in pursuance thereof.

We respectfully submit that this petition for writ of certiorari ought to be denied.

Respectfully submitted,

Joseph C. Donovan,
Robert W. Upton,
John E. Benton,
Attorneys for the Respondent.

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Statement of Case.

This appeal from the Circuit Court of the United States for the First Circuit arises out of an action on the case for negligence, brought by the appellee, Jennie M. Clapper, Administratrix, against the appellant, Bradford Electric Light Company, Inc., to recover damages for the wrongful death of intestate, Leon J. Clapper, who was electrocuted on July 30, 1926, at Haverhill, New Hampshire, while in the employ of the appellant. The appellee alleged that the death of her intestate was caused by the negligence of appellant (a) in failing to provide a suitable switch at its substation; and (b) in failing to warn appellee's intestate of certain dangers or hazards. (R. 31). The appellant pleaded the general issues and filed a brief statement of defense alleging as a bar to the action a contract based upon the Compensation Act of Vermont. (R. 21). The appellee filed a motion to reject the brief statement and this motion was granted subject to exception. (R. 26). The case was tried by jury and a verdict was returned for the appellee on which judgment was entered. The judgment was affirmed by the Court of Appeals, and from the order affirming the judgment, this appeal was prosecuted. To sustain appellate jurisdiction the appellant relies upon Div. (b), sec. 240 of the Judicial Code which provides that,—

> "(b) Any case in a circuit court of appeals where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the

> Constitution, treaties, or laws of the United States, and the decision is against its validity, may, at the election of the party relying on such State statute, be taken to the Supreme Court for review on writ of error or appeal; * * * and the review on such writ of error or appeal shall be restricted to an examination and decision of the Federal questions presented in the case."

The appellant claims that in violation of Art. 4, sec. 1 of the Constitution of the United States, full faith and credit was denied to the provisions of the Workmen's Compensation Act of Vermont, which "by its terms became a part of the contract of employment entered into between the Bradford Electric Light Company, Inc., employer, and Leon J. Clapper, employe * * * which Act constituted a bar to the common law action by the administratrix brought against the employer for injuries sustained while in the course of his employment."

THE REASONS FOR THE APPEAL ARE NOT SUFFICIENT TO SUSTAIN JURISDICTION.

The appellant is a public utility organized under the statutes of Vermont and engaged in business in both New Hampshire and Vermont. The appellee's intestate, Leon J. Clapper, was a resident of Vermont. The appellant's brief statement of defense set out that "said

Bradford Electric Light Company, Inc., hired the said Leon J. Clapper in the state of Vermont to work within and outside of said state," that the contract of hire was subject to the provisions of the Workmen's Compensation Act of said state of Vermont, and that this contract constituted a bar to the common law action brought in New Hampshire by the appellee. (R. 21, 24).

The holding that the alleged contract was not a bar to the action did not involve the validity of the Vermont Act. The appellee's intestate was electrocuted at Haverhill, New Hampshire. The Vermont Act was inoperative in New Hampshire.

In *Pennoyer* v. *Neff*, 95 U. S. 714, 722, the court said:

> "The other principle of public law referred to follows from the one mentioned; that is, that no State can exercise direct jurisdiction and authority over persons or property without its territory. Story, Confl. Laws, c. 2; Wheat. Int. Law, pt. 2, c. 2. The several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others. And so it is laid down by jurists, as an elementary principle, that the laws of one State have no operation outside of its territory, except so far as is allowed by comity; and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions."

The rights of the parties were determinable by the law of the place of injury. Consequently, the constitutionality of the Vermont Workmen's Compensation Act was not drawn in issue as this statute could have no force or effect outside of Vermont.

"The subject of personal injuries received by a workman in the course of his employment is within the control of the sovereign power where the injury occurs. 'It must certainly be the right of each State to determine by its laws under what circumstances an injury to the person will afford a cause of action.'" *Gould's Case*, 215 Mass. 480.

"That law (foreign) may not displace or modify the local law in its effect upon local occurrences and transactions. As to them, the local law will recognize no liability except that which it itself imposes. Otherwise local sovereignty would be impaired." *Saloshin* v. *Houle*, 85 N. H. —, 155 Atl. 47.

"The liability of a person for his act depends, in general, upon the laws of the place where the acts were committed, and although a civil right of action acquired, or liability incurred, in one State or country for a personal injury may be enforced in another to which the parties may remove or where they be found, yet the right or liability must exist under the laws of the place where the act was done." *McDonald* v. *Mallory*, 77 N. Y. 546, 550).

The controversy related to the scope and effect of the alleged contract based upon the Vermont Workman's Compensation Act. The validity of the Vermont Compensation Act within the territory where it might lawfully apply was unquestioned. Under these circumstances, there could be no decision against the validity of the Vermont Act.

> "Whenever the power to enact a statute as it is by its terms or is made to read by construction is fairly open to denial and denied, the validity of such statute is drawn in question but not otherwise." *Balt. & Potomac R. R.* v. *Hopkins*, 130 U. S. 210, 224.

See also:

Miller v. *Cornwall Railroad Co.*, 168 U. S. 131.

Western Life Indemnity Co. v. *Rupp*, 235 U. S. 261.

Johnson v. *New York Life Ins. Co.*, 187 U. S. 491.

The appellant had accepted the compensation provisions of the New Hampshire Employers' Liability and Workmen's Compensation Law. (R. 203). The appellee's action was brought in pursuance of the Compensation provisions which reserve to the employee his right of action at common law. Sect. 11, ch. 178 N. H. P. L. Consequently the parties elected to have their rights determined according to the laws of New Hampshire thereby abrogating the agreement based on the

Vermont Compensation Act. Moreover, an agreement exempting the employer from liability for future negligence is in New Hampshire against public policy and invalid. *Piper* v. *Railroad*, 75 N. H. 228, 435; *Johnston* v. *Fargo*, 184 N. Y. 379, 7 L. R. A. (NS) 537. In deciding the instant case, the Court of Appeals said (Anderson, J.):

> "On rehearing, the attention of the court is sharply directed to the fact that the defendant expressly accepted the New Hampshire Workman's Compensation Act. P. L. N. H. 1926 c. 178. This Act reserves, in section 11, to the employee or his legal representative, an action at law for damages or death caused by negligence. It is clear that this Act applies to actions for negligence occurring in New Hampshire, and that its acceptance binds the defendant in this action of tort. We are also satisfied that we were in error in our previous holding; and that no contract made in Vermont purporting to release an employer from liability for future negligence can bar an action brought in New Hampshire for an injury there sustained and thus change the public policy of New Hampshire. See *Saloshin, Adm'x*, v. *Houle* (N. H.) decided May 5, 1931. It follows that on both grounds the former decision of this court must be reversed." (R. 374). *Bradford Electric Light Co.* v. *Clapper*, 51 Fed. (2d) 992,999.

The decision properly turned upon the laws and policy of New Hampshire. The alleged contract, not the Ver-

mont Workmen's Compensation Act, was held ineffective. The full faith and credit clause was not intended to deny to a state the power to make its laws effective within its own territory; nor was it intended to preclude persons doing business within its limits from modifying contracts made elsewhere. *Allgeyer* v. *Louisiana*, 165 U. S. 578; *Paul* v. *Virginia*, 8 Wall. 168; *Dougherty* v. *Amer. McKenna Process Co.*, 255 Ill. 369; *New York Life Ins. Co.* v. *Dodge*, 246 U. S. 357.

We respectfully submit that the reasons assigned for the appeal are not sufficient to sustain jurisdiction.

Respectfully submitted,

John E. Benton,
Joseph C. Donovan,
Robert W. Upton,

Counsel for Appellee.

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OPINION IN THE CIRCUIT COURT OF APPEALS

Bradford Electric Light Co. v. Clapper, 51 Fed. (2d) 992

Brief for Respondent

The action was brought by the respondent, Jennie M. Clapper, as administratrix of the estate of Leon J. Clapper, in the Superior Court for Hillsborough County, against the petitioner, Bradford Electric Light Company, Inc. to recover damages for the death of her intestate alleged to have been caused by the negligence of the petitioner. The case was removed by the petitioner to the District Court, the ground for removal being diversity of citizenship. (*R.* 1). The petitioner pleaded the general issue and filed a brief statement, alleging as a bar to the action a contract based upon the Compensation Act of Vermont. (*R.* 7-8). The respondent filed a motion to reject the brief statement and this motion was granted subject to the petitioner's exception. (*R.* 11). The case was three times tried by jury. At the last trial, a verdict was returned for the respondent on which judgment was entered. This judgment was affirmed by the Court of Appeals, Wilson, J. dissenting.

The petitioning corporation is a public utility organized under the laws of the state of Vermont, and engaged in business in both New Hampshire and Vermont. The respondent's intestate, Leon J. Clapper, was a resident of Vermont. He was employed by the petitioner to do work in either state as circumstances might require. On July 30, 1926, in the course of his employment, he was electrocuted at the petitioner's substation at Haverhill, N. H., because of the petitioner's failure to install and maintain a suitable disconnecting switch. (*R.* 37-38-82-84).

At the trial the petitioner offered to prove that it had accepted the compensation provisions of the Employers' Liability and Workmen's Compensation Act of New Hampshire. Formal proof was waived and it was agreed that the petitioner had accepted the act. (*R.* 66). The employers' liability provisions of the act abolish the defence of assumption of risk and fellow service. Secs. 2, 3, Ch. 178, P. L. By accepting the compensation provisions, the employer is relieved from the enlarged common law liability. The section relating to acceptance is as follows:

"The provisions of sections 2 and 3 shall not apply to any employer who shall have filed with the commissioner of labor his declaration in writing that he accepts the provisions of this chapter as contained in the succeeding sections, and who shall have satisfied the commissioner of his financial ability to comply with its provisions; or who shall have filed with the commissioner a bond, in such form and amount as the commissioner may prescribe, conditioned on the discharge by such employer of all liability incurred under this chapter. Such employer shall thereafter be liable to all workmen engaged in any of the employments specified in section 1 for any injury arising out of and in the course of their employment, in the manner provided in the following sections". Sec. 4, Ch. 178, P. L.

But the compensation provisions expressly reserve to the employee his right of action for damages at common law or under any statute". The employee may elect after injury whether to take compensation or to bring his suit for damages. In this respect, the provisions of the New Hampshire law are unique, having no parallel among the other compensation acts. The other compensation acts seek to make compensation the exclusive remedy. See Bulletin No. 496, U. S. Labor Statistics. They either provide for election before injury or provide directly that the compensation shall be exclusive. Sec. 11, Ch. 178, P. L., which preserves the right to recover damages, is as follows:

"The right of action for damages caused by any such injury, at common law or under any statute, shall not be affected by this chapter; but in case the injured workman, or in event of his death his executor or administrator, shall avail himself of this chapter, either by accepting any compensation hereunder, by giving the notice hereinafter prescribed, or by beginning proceedings therefor in any manner on account of any such injury, he shall be barred from recovery in every action at common law or under any other statute on account of the same injury."

The petitioner by setting up its acceptance of the compensation provisions had the benefit at the trial of the common law

defences of assumption of risk and fellow service, which otherwise would not have been available to it. Secs. 2, 3 and 4, Ch. 178, P. L.

The principal questions relate to the effect to be given in New Hampshire to the alleged contract based upon the Compensation Act of Vermont. The petitioner maintains that the contract as set out in its brief statement of defense is a complete bar to this action for the death of respondent's intestate occurring while employed in New Hampshire. The respondent's motion to reject the brief statement being in the nature of a demurrer admitted the averments of fact contained in the brief statement. But the case is to be determined upon the entire record. The judgment for respondent may not be vacated if upon examination of the entire record the judgment appears to have been properly entered.

> "On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court without regard to technical errors, defects or exceptions which do not affect the substantial rights of the parties." Sect. 391, Title 28, U. S. Code.
>
> "The appellee may . . . urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it". *U. S.* v. *Am. Ry. Exp. Co.*, 265 U. S. 425, 435.

THE LAW AND POLICY OF NEW HAMPSHIRE RELATIVE TO INDUSTRIAL ACCIDENTS.

The plaintiff's intestate having received the injuries which caused his death in New Hampshire the rights of the parties depend primarily upon the laws of New Hampshire. *Martin* v. *West*, 222 U. S. 191; *Atlantic Transport Co.* v. *Imbrovek*, 234 U. S. 52; *Gould's Case*, 215 Mass. 480. *Saloshin* v. *Houde*, 85 N. H. ——; 155 Atl. 47. The statutes of New Hampshire both as to survival of actions and workmen's compensation are *sui generis*. As between master and servant the common law rules

of liability have been maintained without impairment. In providing for workmen's compensation, the right of the employee, or of his personal representative in the event of his death, to recover damages for the negligence of his employer was preserved.

The statute providing for the survival of actions for wrongful death is not based upon Lord Campbell's act. Secs. 11, 14, Ch. 302, P. L. The measure of damages is not the loss to dependents. *Imbriani* v. *Anderson*, 76 N. H. 491. As originally enacted the statute was quasi penal, and gave rights only as against railroads. The statute provided for the impositions of a fine "not exceeding five thousand dollars nor less than five hundred dollars" for the benefit of the widow or heirs of the deceased. Sec. 14, Ch. 264, G. S. (1867). The penalty was enforced by indictment. *State* v. *Railroad*, 52 N. H. 528.

In 1887 the law was broadened so as to permit the personal representative to institute an action to recover damages against any person or corporation causing death by negligence or other wrongful act. The elements of damage were defined and provision made for their distribution. Ch. 71, L. 1887. The essential characteristics of this statute have been preserved. The elements of damage are "the mental and physical pain suffered by him * * * the reasonable expenses occasioned * * * by the injury * * * the probable duration of his life but for the injury, and his capacity to earn money, * * *" Sec. 12, Ch. 302, P. L. In the event of recovery the damages are to be distributed one-half to the widow or widower and the other one-half to the children of the deceased, and if no widow or children to the heirs of the deceased according to the laws of distribution. Sec. 14, Ch. 302, P. L. A recent case defining some of the distinctive features of this statute is *Holland, Admx.* v. *Morley Button Co.*, 83 N. H. 482:

> "For the satisfaction of the judgment to constitute a discharge *pro tanto* of the employer's obligation it must appear that both the judgment debt and the employer's obligation were in whole or definite part for the same loss or damage and in favor of the same parties. Many of the acts in other jurisdictions give an employer paying compensation

the right to enforce the liability of a third person for the injury to the workman, at least to the extent of the compensation paid. Legislation here to create such a right seems essential, at least in cases where the injuries are fatal. * * *

"It thus appears that persons may share in compensation who do not share in the payment of damages for the tort, and that the division of compensation among those who do share in the payment for the tort is not rigidly proportional. In the equitable division between widow and children totally dependant their varying resources and prospects would be considered. As between a totally dependent widow in poor health and a totally dependant child soon to be able to be self-supporting, for example, the statutory division of the damages for the tort could not fairly be adopted in dividing compensation.

"As to the elements to be taken into account in determining the amount of damage for the tort causing death, they include allowance for pain, expense caused the decedent's estate, and his loss of earning capacity, with limits for the entire amount recoverable. P. L., c. 302, ss. 12, 13. Compensation payable in case of death is the amount of wages not above a fixed limit which would be earned in a fixed period when the dependency is total and proportionately thereto when it is partial. P. L., c. 178, s. 19."

See also: *Imbriani* v. *Anderson*, 76 N. H. 491.
Dillon v. *Railway*, 73 N. H. 367.
Davis v. *Herbert*, 78 N. H. 179.

The results in *Holland, Admx.* v. *Morley Button Co., supra*, are opposed to the law in most jurisdictions, but entirely sound. The decision serves to emphasize some of the distinguishing features of the local statute providing for the survival of actions. Decisions from other jurisdictions might aid but would scarcely control in its interpretation. Likewise in the development of workmen's compensation New Hampshire has not followed the general trend. The local compensation act adopted in 1911 is administered by the courts and the employee is permitted after injury to choose between compensation and his common law

right of action for damages. The great majority of workmen's compensation acts are administered by commissions. All other compensation acts provide either directly or indirectly for the elimination of suits for damages usually by requiring election of remedies before injury. New Hampshire recognizes that compensation does not compensate the injured employee for his loss. The right of the employee to recover his entire loss when his injury is due solely to the negligence of his employer has been maintained. Under the New Hampshire system the benefits of compensation are assured to the employee and the inflexibility and injustice of an exclusive system of compensation largely eliminated. As a consequence, most of the claims arising out of industrial accidents are adjusted on an equitable basis without litigation. The legislature of New Hampshire has repeatedly refused to abolish the right of election after injury.* The differences in policy between New Hampshire and the other states are such that the rights of the parties to this action may not properly be determined by decisions from other jurisdictions.

The decision in this case is conformable to the law and policy of New Hampshire as established by its legislature and declared by its Court. In considering this case, we are confronted by the petitioner's attempt to avoid the consequences of its acceptance of the compensation provisions of the New Hampshire act. The petitioner, in setting up its acceptance of the compensation provisions of the New Hampshire act, took a position inconsistent with its brief statement. At the trial the petitioner claimed that the rights of the parties were controlled by its acceptance of the New Hampshire act and its contention became the law of the trial. By proving its acceptance of the compensation provisions, the petitioner had the benefit of the defenses of assumed risk and fellow service, (*R.* 66-100), which otherwise would not

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* Among the compensation measures abolishing the right of election after accident which have been rejected, are the following: 1915 Session, House Bills No. 206, 302, Journal, 720, 1021; 1917 Session, House Bills No. 319, 485, Journal, 567, 568; 1919 Session, House Bill No. 134, Journal, 437; 1927 Session, House Bill No. 212, Journal, 752; 1929 Session, House Bill No. 292, Journal 752. The bills rejected in 1927 and 1929 were modeled after the Vermont law. In 1923 the Compensation Act was amended to increase the compensation (Ch. 91, Laws of 1923) and in 1925 the Compensation Act as amended was re-enacted without change. (Ch. 178, P. L.)

have been available to it. Sec. 2 and 3, Ch. 178, P. L. Having set up its acceptance of compensation and obtained the benefit of it in this action, the petitioner ought not to be heard to assert that the acceptance did not extend to the respondent's intestate when electrocuted. The legal consequences naturally attaching to the petitioner's acceptance are not enlarged, if the petitioner is held to the law of the trial. The acceptance was unlimited. It included all of the petitioner's employees, (*R.* 66) *Cox's Case* 225 Mass. 220. In accepting the compensation provisions, the petitioner agreed "thereafter (to) be liable to all workmen engaged in any of the employments specified in section 1 for any injury arising out of and in the course of their employment, in the manner provided in the following sections." Sec. 4, Ch. 178, P. L.

The respondent's action was brought in pursuance of and "in the manner provided in the following sections." Sec. 11, Ch. 178, P. L. Consequently, the petitioner's acceptance of the compensation provisions of the New Hampshire act is necessarily an important factor in determining the rights of the parties. In deciding the case, the Court of Appeals said, Anderson, J.:

> "On rehearing, the attention of the court is sharply directed to the fact that the defendant expressly accepted the New Hampshire Workman's Compensation Act, — P. L. N. H. c. 178. This Act reserves, in section 11, to the employee or his legal representative, an action at law for damages or death caused by negligence. It is clear that this Act applies to actions for negligence occurring in New Hampshire, and that its acceptance binds the defendant in this action of tort. We are also satisfied that we were in error in our previous holding; and that no contract made in Vermont purporting to release an employer from liability for future negligence can bar an action brought in New Hampshire for an injury there sustained and thus change the public policy of New Hampshire. See *Saloshin, Adm'x.* v. *Houle* (N. H.), decided May 5, 1931. It follows that on both grounds the former decision of this court must be reversed." (*R.* 145).

A CONTRACT INTENDED TO EXEMPT THE EMPLOYER FROM LIABILITY FOR NEGLIGENCE IS AGAINST THE PUBLIC POLICY OF NEW HAMPSHIRE AND INVALID.

In sustaining the respondent's motion to reject the brief statement, the district court, Morris, J., held that "actions under the Employer's Liability Act of New Hampshire are based on tort not on contract and the law of Vermont has no extra-territorial effect". (*R.* 12). In holding that the common law liability of the employer had not been abrogated, proper consideration was given to the history and development of the local system for the protection of employees from the consequences of industrial accidents. The general policy as to the application and enforcement of foreign law in redressing local wrongs was recently declared by the Supreme Court of New Hampshire in *Saloshin* v. *Houle;* 85 N. H.—; 153 Atl. 47.

> "It is sought by the transfer of the case to have it here determined what effect the plaintiff's acceptance of compensation in New York had upon the action. The answer depends, first, upon the policy of comity in enforcing the laws of other states, and second, if comity may be invoked, upon the New York law relating to and regulating compensation. As the record is understood, the plaintiff as the decedent's widow is the sole beneficiary of the action under P. L. c. 302, s. 14, II. It does not appear that there are minor or dependent children to share with her in any recovery. However the New York law is to be construed, comity in its recognition and enforcement would not go so far as to permit it to defeat local law. Conduct of the plaintiff which sought to divest beneficiaries of their interest without their consent and enured solely to her benefit would be regarded as illegal here. A legal character of the conduct in the state of the domicile will be given no effect here when to do so tends to alter the local law. Local jurisdiction over the action gives jurisdiction over its proceeds, and hence over their disposal. Nor may the New York law give the insurer any right of action, independent of that of the plaintiff,

which may be enforced here. That law may not displace or modify the local law in its effect upon local occurrences and transactions. As to them, the local law will recognize no liability except that which it itself imposes. Otherwise local sovereignty would be impaired. It follows that if the New York law might be construed as giving the insurer a right of action of its own distinct from that of the plaintiff, it could not be maintained here. And it also follows that the amount of recovery in the local action cannot be affected by foreign law. The rule of damages is no less immune to change than that of liability. But since the plaintiff was personally subject to the laws of New York, her conduct pursuant thereto is to be recognized here so far as local laws and policy are not disregarded."

It is asserted "that compensation acts are not contrary to the public policy." (*R.* 148). But in so far as this may be true the result has been attained by legislative action. At common law contracts intended to relieve the employer from liability from future negligence are invalid. *Piper* v. *Railroad*, 75 N. H. 228, 435; *Johnston* v. *Fargo*, 184 N. Y. 379. The reasonableness of the consideration does not enter into the determination of the validity of such agreements. Consequently, agreements embodying compensation principles have been held valid only if they preserve to the employee "the right to elect whether he will sue his employer or accept benefits from the association." *C. B. & Q. Railroad* v. *Miller*, 76 Fed. 439.

And in *Twaits* v. *Pennsylvania R. R. Co.*, 77 N. J. Eq. 103, the law was stated as follows:

"... The law forbids and therefore treats as invalid a contract between an employer and employee which absolves the employer from responsibility for his own negligence. This contract entered into between Twaits, an employe of the Pennsylvania Railroad Company and the relief department, would come under this ban and be invalid were it not for the fact that after an accident the employe is left free either to sue the company or accept the benefits accruing to him by reason of his membership in the relief department.

"Such is the construction placed upon this contract by our own and many other courts . . ."

See also *Day* v. *Atlantic Coast Line R. Co.* 179 Fed. 26; *Johnson* v. *Philadelphia & Reading R. R.*, 163 Pa. 127; *Otis* v. *Pennsylvania Co.*, 71 Fed. 136. Labatt: Master and Servant, (2nd ed) Sect. 1921.

Among the first of the compensation laws to be enacted was that of New Hampshire. It adopted rudimentary principles and recognized the legal tests applied to the benefit systems by giving to the employee the right to elect after injury whether to bring his action for damages or to accept compensation. *Gordon* v. *Company*, 83 N. H. 221. Therefore, the statute takes nothing from the common law rights of the employee. On the contrary, in expressly guaranteeing to the employee his right to bring his action for damages, the rules of the common law were reaffirmed. Among them was the rule that any contract or agreement exempting the employer from liability is invalid.

It is claimed that the alleged contract based on the Vermont compensation act being valid where made ought to be enforced in New Hampshire. In determining whether such a contract ought to be enforced in New Hampshire, a fair test is to inquire whether such a contract if made in New Hampshire would be valid. It is plain that such a contract if made in New Hampshire would not be enforcible. *Piper* v. *Railroad, supra; Conn* v. *Company*, 79 N. H. 450; *Wessman* v. *Railroad*, 84 N. H. 475, 152 Atl. 476.

No principle of comity requires the enforcement of a contract which is against the public policy of the state where the contract is to be performed and which would be unlawful if made therein. *Piper* v. *Railroad, supra.*

The New Hampshire Employers' Liability and Workmen's Compensation Act applies to certain hazardous employments. It applies to all employees and all employers engaged in those employments. No distinction based upon the place of hire is recognized. The purpose of this legislation is preventative as well as remedial. The enlarged liability has a tendency to reduce industrial accidents. If the employee were permitted by contract to

exempt the employer from his liability for negligence, this purpose might be defeated. The situation is similar to that arising under the federal laws relating to the safety of employees of railroads. Contracts intended to relieve the railroad from the obligations imposed by these laws have been regarded as against public policy. In a leading case, *Philadelphia, B. & W. Railroad Co.* v. *Schubert*, 224 U. S. 603, the court (Mr. Justice Hughes) said:

> "In speaking of the act in question, this court said that 'the natural tendency of the changes described is to impel the carriers to avoid or prevent the negligent acts and omissions which are made the bases of the rights of recovery which the statute creates and defines; and, as whatever makes for that end tends to promote the safety of the employees and to advance the commerce in which they are engaged,' there was no doubt that 'in making those changes Congress acted within the limits of the discretion confided to it by the Constitution'. Second Employers' Liability Cases, supra, p. 50. (223 U. S. 51, 32 Sup. Ct. Rep. 175, 56 L. Ed. 169). If Congress may compel the use of safety appliances (*Johnson* v. *Southern Pac. Co.*, 196 U. S. 1, 17 Am. Reg. Rep. 412, 25 Sup. Ct. 158, 49 L. Ed. 363), or fix the hours of service of employees (*Balt. & O. R. R. Co.* v. *Interstate Commerce Commission*, 221 U. S. 612, 31 Sup. Ct. 621, 55 L. Ed. 878), its declared will, within its domain is not to be thwarted by any previous stipulation to dispense with the one or to extend the other. And so, when it decides to protect the safety of employees by establishing rules of liability of carriers for injuries sustained in the course of their service, it may make the rules uniformly effective. These principles, and the authorities which sustain them, have been so lately reviewed by this court that extended discussion is unnecessary."

For similar reasons the attempts to extend state compensation laws to accidents subject to maritime law have failed. In *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, 216 it was held that the compensation law of New York was as to maritime accidents, invalid. The Court said:

"And plainly, we think, no such legislation is valid if it contravenes the essential purpose expressed by an act of Congress, or works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations. This limitation, at the least, is essential to the effective operation of the fundamental purposes for which such law was incorporated into our national laws by the Constitution itself."

See also: *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149. *Washington* v. *Dawson & Co.*, 264 U. S. 219.

The respondent's action sounds in tort. It is well settled that actions for tortious wrongs are controlled by the law of the place of injury. *Gould's Case*, 215 Mass. 480. The laws of New Hampshire provide that the employer shall respond in damages for negligence causing the death of his employee. The contract based upon the laws of Vermont offered as a bar is opposed to the law as declared by the Supreme Court of New Hampshire (*Piper* v. *Railroad*, supra) and reaffirmed by its legislature. The ruling rejecting the brief statement was based upon a clear appreciation of the law and policy of New Hampshire.

Among the numerous cases cited by the petitioner, *Barnhart* v. *American Concrete Steel Company*, 227 N. Y. 531, alone presents a comparable situation. In that case the plaintiff's intestate and the defendant were both domiciled in New Jersey and subject to the provisions of its Compensation Act. The plaintiff's intestate was killed in New York. There was no evidence that the defendand had localized its business in New York. The Constitution of New York had then been amended to permit compulsory workmen's compensation. Consequently, the court held that the rights of the parties were controlled by the compensation law of New Jersey. The result would probably have been quite different but for the changes in policy introduced by the amendment to the Constitution. *Johnston* v. *Fargo*, 184 N. Y. 379. And cases from jurisdictions where the common law action has virtually been abrogated by the Compensation Acts are of no real value because in New Hampshire the common law action has been preserved.

THE ALLEGED CONTRACT BASED UPON THE VERMONT ACT WAS SUPERSEDED BY AN AGREEMENT BASED UPON THE LAWS OF NEW HAMPSHIRE.

Even if the alleged contract, based upon the Vermont Compensation Act, were valid in New Hampshire, there still remains the question whether the contract may not have been superseded by a new agreement. In Vermont, the provisions of the Compensation Act were made a part of the contract of hiring, unless the employer or employee gave written notice that its provisions were not to apply. (*R.* 8). But the laws of Vermont can have no extra-territorial effect. In New Hampshire the parties were free to modify this contract. The petitioner maintained a large portion of its distribution system in New Hampshire and might properly bring its men when at work there under local law. The petitioner, by written declaration, accepted the compensation provisions of the Employers Liability and Compensation Act of New Hampshire. "Such employer shall thereafter be liable to all workmen engaged in any of the employments specified in Sect. 1 for any injury arising out of and in the course of their employments in the manner provided in the following sections:" Sec. 4, Ch. 178, P. L. The respondent's intestate when injured was engaged in one of the specified employments. This action is brought by respondent as authorized by "the following sections". See, Secs. 11, 12, Ch. 178, P. L.

The petitioner's acceptance, at the least, was an offer to its employees injured in New Hampshire to pay compensation or to respond in damages according to the provisions of the Compensation Act. This offer was accepted by the respondent. The election of both parties to have their rights determined by the laws of New Hampshire, constituted an agreement superseding the alleged contract, based upon the Compensation Act of Vermont. The parties omitted no act necessary to have their rights determined by the laws of New Hampshire.

If application of the local law under circumstances similar to those disclosed by the present case is to be denied, there will be much confusion and uncertainty injected into an important branch of the law. The petitioner did everything required by the law of New Hampshire to bring its men at work within the state under

the provisions of the New Hampshire Compensation Act. The rule asserted by the petitioner would deny to an employer doing business in two or more states, the right to localize his business and establish a uniform rule of liability in each state. For instance, if an employer doing business principally in Vermont should undertake highway or other construction work in New Hampshire, and should take his workmen from Vermont to New Hampshire, the rights of the parties, in the event of injury, would be determined according to the law of Vermont, even though the employer accepted the provisions of the New Hampshire Compensation Act and insured his workmen thereunder. Such results are opposed to sound policy and the great weight of authority. The theory that the compensation law of the place of hire determines the rights of parties must not be extended so far as to deny the employer and employee the right to modify the contract when the parties enter another jurisdiction. Moreover, it is not the contract of hire, but the relation arising therefrom upon which the law should operate. The obligation to pay compensation arises out of the relation of master and servant rather than out of the contract by which that relation is created. The relation is brought into existence from day to day as the service is performed. Consequently, when the employer and employee both enter another state, there is no sound reason why the law there should not determine the obligations arising out of the relation of master and servant.

In *American Radiator Co.* v. *Rogge*, 86 N. J. L. 436, 439, it appeared that Rogge was employed in New York and injured in New Jersey. It was held that the rights of the parties must be determined according to the law of the place of injury. The court said:

> "The liability of the employer to make compensation is an obligation superimposed upon the original contract as a condition of its performance in New Jersey, and it is contractual in character because either party may escape the obligation by giving notice that he will not be bound thereby, and because it does not arise out of any wrongdoing. But the addition of this contractual obligation by statute does not affect the contract of hiring; that is still enforced as far as it goes by its terms."

In *Douthwright* v. *Champlin*, 91 Conn. 524, an action to recover compensation, it appeared that the contract of hire was made in Massachusetts and that the claimant was injured in Connecticut. The court held that the Connecticut Compensation Act applied and said:

> "The express acceptance of our Act by these parties added its compensation features to their contract. In the absence of their refusal, the law would have added this to their contract; in either case it would have become a part of the contract."

In *American Mut. Liability Ins. Co.* v. *McCaffrey et al.* 37 Fed. (2d) 870, certiorari denied, 281 U. S. 751, it appeared that the Chattanooga Boiler & Tank Company was a Tennessee corporation engaged in the manufacture of tanks used by oil companies. It undertook to erect a tank in Texas. McCaffrey was employed in Tennessee. He was sent to Texas to assist in the erection of the tank and while there injured. The Tank Company accepted the provisions of the compensation act of Texas by becoming a subscriber for insurance. In holding that the case was controlled by the Texas compensation act the court said:

> "In view of what plaintiff alleges as to the time and place of his employment, the admission with respect to his employer having become a subscriber for insurance under the statute, and the defendant insurance company having assumed the liability plus the showing that the claim was made and prosecuted before the Industrial Board, we think it conclusively established that he comes under the Texas law."

In *Carl Hagenback & Great Wallace Show Co.* v. *Randall*, 75 Ind. App. 417, 126 N. E. 501, it appeared that one Randall was employed in Ohio by a written agreement. The agreement provided that "all matters whether sounding or in tort, relating to its validity, construction, and interpretation be determined" according to the laws of the District of Columbia. Randall was killed in Indiana and his mother filed a petition for compensation. In holding that the rights of the parties must be determined by the law of Indiana the court said:

"The Workmen's Compensation Act of this state (sections 2-4, 15, Acts 1915) specifically provides that every employer in the state is presumed to have accepted the provisions of the act, and to have agreed to be bound thereby, unless such employer, 30 days before the accident resulting in injury or death, shall have given notice of exemption, and that no contract can operate to relieve any employer of any obligation created by the act. It is not contended that appellant gave the required notice, or any notice whatever. Appellant's show and show train were brought into Indiana, and appellant's business was being conducted in Indiana, just as had been contemplated by the parties at the time the employment contract in question was executed, and Randall, at the time of his death, was in the line of his employment as provided by such contract. Under such circumstances the public policy of Indiana as established by her compensation law did not give way because the contract of employment had been made in Ohio. Appellant's obligation under the Indiana act was superimposed upon the Ohio contract as a condition of its performance in this state. Appellant could not relieve itself of the statutory obligation by a foreign contract. The one way of exemption was by notice as provided by the Act."

And in *Johns-Manville, Inc.* v. *Thrane*, 80 Ind. App. 432, the evidence established that Johns-Manville, Inc., a foreign corporation, was performing work at Rochester, Indiana, under a contract with Armour & Company. It accepted the workmen's compensation act of Indiana "by insuring its compensation liability covering the work it is performing for said Armour & Company." In the course of the work Thrane was killed. He was a resident of Illinois and was there originally employed by Johns-Manville, Inc. He was sent in to Indiana to assist in the work being done there. In holding that the case was controlled by the compensation act of Indiana the court said:

"Appellant challenges the Industrial Board's finding that appellant was an Indiana employer, and that the deceased was an Indiana employee as wholly unsupported by the evi-

dence. An examination of the evidence discloses that the deceased was first employed for work in the city of Chicago, Illinois, at a wage of sixty-eight and one-half cents per hour. At this time there was nothing said about his going to Indiana. Later, he was sent to Indiana, where he worked under the direction of a local boss. The record is silent as to the amount that he was to receive as wages, though he was paid for his services, and in addition to his wages in money he was furnished room and board. The contract, express or implied, under which he was working at the time of his injury was different from the one under which he served in Chicago, and, whether made in Illinois or in Indiana, was made in contemplation of performance in Indiana, and as such was subject to the Workmen's Compensation Act of Indiana. The facts as disclosed by the evidence fully justified the board's finding that appellant was an Indiana employer, and the deceased an Indiana employe. Appellant relies upon the case of *Darsch* v. *Thearle Duffield, etc., Co., supra,* for reversal, but the case is readily distinguished from the instant case. In that case the employer had not localized itself, or qualified to do business in the state, and, as far as the record shows, had no place of business in the state. It had not in any manner accepted the provisions of the Workmen's Compensation Act. The injured employe had been working in Illinois under an Illinois contract of employment, and as an incident of his contract was temporarily in this state. It did not there appear that the contract of employment contemplated service in Indiana."

See also: *Smith* v. *Heine Safety Boiler Co.,* 119 Me. 552. *Ocean Accident & Guarantee Corp.* v. *Industrial Commission,* 32 Ariz. 265. *Johnson* v. *Nelson,* 128 Minn. 158. *Mitchell* v. *St. Louis Smelting & Refining Co.,* 202 Mo. App. 251. *Ginsburg* v. *Byers,* 171 Minn. 366.

Of course unanimity among the authorities is lacking, but many of the cases are distinguishable because of essential differences in the facts. The rule enunciated in the foregoing cases applies when the employer is doing business within the state. The qualification of the rule appears in the case of *Norman* v. *Hartman*

Furniture and Carpet Company, 84 Ind. App. 173. There one Norman was a buyer employed by the defendant, a corporation under the laws of Illinois and having its principal place of business at Chicago and carrying on no business in Indiana. Norman, in the course of his employment was killed in an automobile accident in Indiana. In holding that the widow's claim did not come within the Indiana Compensation Act the court said:

> "Appellant has filed an able and exhaustive brief, and claims that on the authority of *Darsch* v. *Thearle Duffield, etc., Co.* (1922), 77 Ind. App. 357, 133 N. E. 525, the award should be reversed. In the case cited, the facts were: That both parties were residents of the State of Illinois; that the contract of employment between the parties was entered into in the State of Illinois; that appellant was an Illinois corporation and had no office or place of business in the State of Indiana; that at the time of the injury the employee was only temporarily in Indiana, and the court there affirmed an award dismissing the claim for want of jurisdiction. We adhere to that decision.
>
> "In the instant case the agreed statement of facts shows that appellant and appellee were residents of Chicago, Illinois, and that the contract of employment was entered into in Illinois; that appellee had not localized in Indiana, and that Raleigh H. Norman, at the time of his injury and death, was in Indiana, temporarily engaged in his master's business."

The Indiana decisions go far toward solving the difficult problems presented by this phase of the conflict of laws. Under the Indiana decisions a non-resident employer entering the state to do business is regarded as an Indiana employer when he has localized his business and taken the steps necessary to bring his workmen under the compensation act. Under these circumstances, the place of hire is regarded as immaterial and the rights of the employee injured in the course of the business are determined by the law of the place where the injury occurred. In such situation under the contract theory it may fairly be held that the parties have evinced a purpose to have their rights determined according

to the law of the place where the work is being done. But where the employer has no place of business in Indiana and his employee is merely casually there, then the Indiana Compensation Act is held not to apply. Here, according to the contract theory, there is no basis for holding that the parties have adopted the law of the place of injury.

If the present case is to be controlled by the contract theory no element is lacking to establish the respondent's right to maintain her action. The petitioner having a localized business in New Hampshire, by written declaration accepted the compensation provisions of the Employers' Liability and Workmen's Compensation Law. This was an unequivocal offer to compensate in accordance with those provisions employees injured in New Hampshire. The injury and the death of respondent's intestate occurred in New Hampshire while he was in an employment subject to those provisions and the respondent has elected to bring this suit in pursuance thereof. The petitioner's offer and the respondent's acceptance constitute a binding agreement to submit their rights for determination according to the laws of New Hampshire.

We respectfully submit that the judgment for the respondent ought to be affirmed.

Respectfully submitted,

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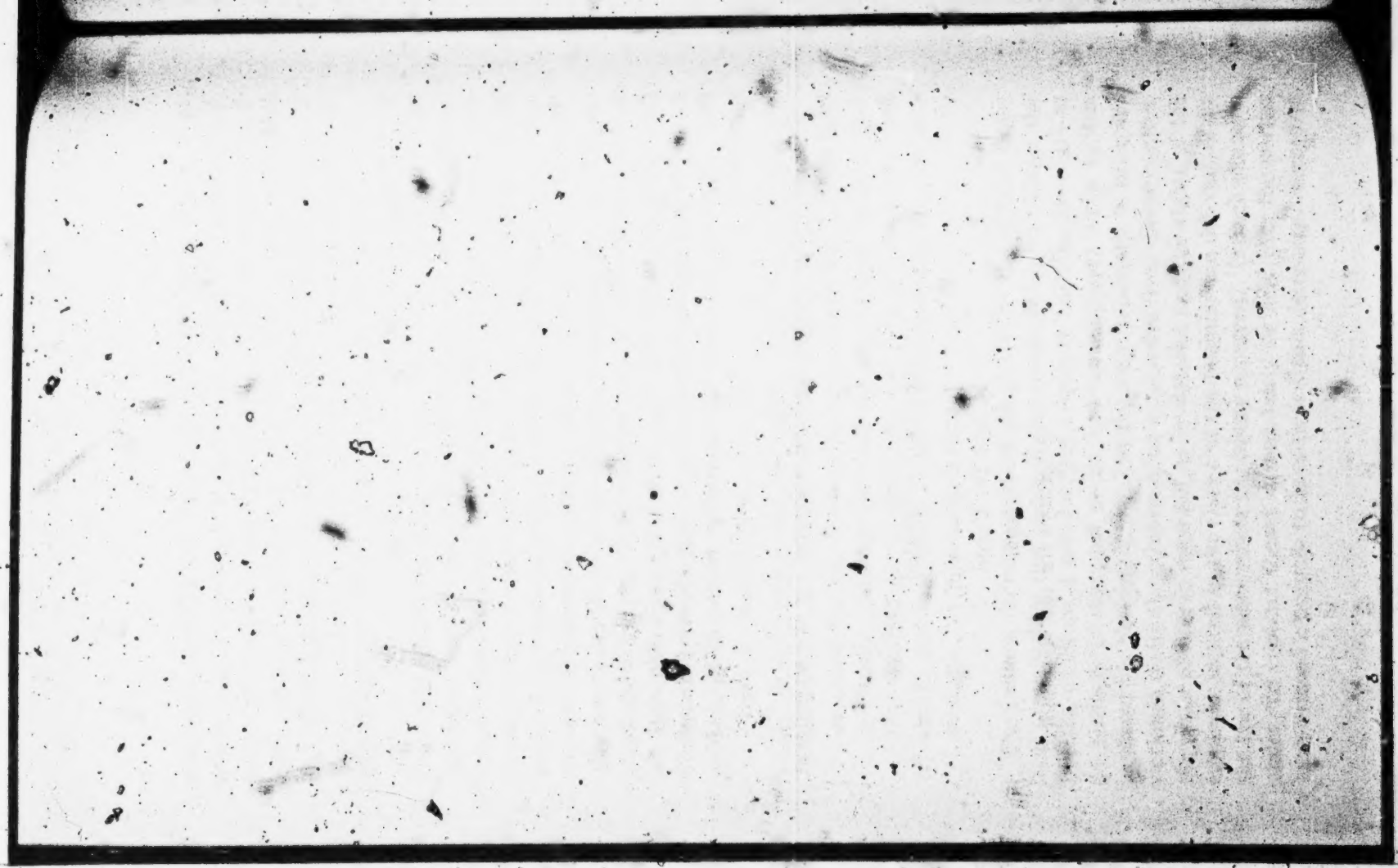
Attorneys for the Respondent.



SUPREME COURT OF THE UNITED STATES.

No. 423.—October Term, 1931.

Bradford Electric Light Company, Inc., Appellant and Petitioner,
vs.
Jennie M. Clapper, Administratrix.

Appeal from the United States Circuit Court of Appeals for the First Circuit.

Petition for writ of certiorari to the United States Circuit Court of Appeals for the First Circuit.

[December 7, 1931.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

This action was brought in the Superior Court of New Hampshire by the respondent, a citizen of that State, to recover damages for injuries resulting in the death of the respondent's intestate, upon the ground of the negligence of his employer, the defendant (appellant and petitioner here). The case was removed to the District Court of the United States for the District of New Hampshire. The defendant is a corporation organized under the laws of Vermont and is engaged in supplying electric current in both Vermont and New Hampshire. It appeared that the respondent's intestate was a resident of Vermont and received his injuries in New Hampshire in the course of his employment. The contract of employment was made in Vermont and the defendant contended that the parties were bound by the Workmen's Compensation Act of Vermont and that the acceptance of the provisions of that Act was a bar to the common law action. Upon appeal from the judgment in favor of the respondent, the Circuit Court of Appeals first sustained the defense and directed reversal, but on rehearing affirmed the judgment. The Court said that its attention had been called to the fact that the defendant had accepted the Workmen's Compensation Act of New

Hampshire which reserved to the employee or his legal representative an action at law for death caused by negligence; "that no contract made in Vermont purporting to release an employer from liability for future negligence can bar an action brought in New Hampshire for an injury there sustained, and thus change the public policy of New Hampshire". 51 Fed. (2d), 992, 999, 1000. As the decision of the Circuit Court of Appeals was not against the validity of the statute of Vermont, the appeal to this Court must be dismissed for the want of jurisdiction. *Public Service Commission of Indiana* v. *Batesville Telephone Company,* 284 U. S. —; *Samuel W. Baxter as Administrator, etc.* v. *Continental Casualty Company,* 284 U. S. —; decided October 26, 1931.

The question is presented whether, as an appeal has been taken, the petition for writ of certiorari can be entertained. Section 240 of the Judicial Code as amended by the Act of February 13, 1925 (c. 229, 43 Stat. 936, 938, 939; U. S. C., Tit. 28, sec. 347), provides:

"Sec. 240. (a) In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal.

"(b) Any case in a circuit court of appeals where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is against its validity, may, at the election of the party relying on such State statute, be taken to the Supreme Court for review on writ of error or appeal, but in that event a review on certiorari shall not be allowed at the instance of such party, and the review on such writ of error or appeal shall be restricted to an examination and decision of the Federal questions presented in the case.

"(c) No judgment or decree of a circuit court of appeals or of the Court of Appeals of the District of Columbia shall be subject to review by the Supreme Court otherwise than as provided in this section".

The question is whether the general authority of this Court, under paragraph (a) of this section, "in any case . . . in a circuit court of appeals . . . to require by certiorari" that the cause be certified to this Court for determination, is limited in a case like

the instant one by the concluding clause of paragraph (b). Under the latter paragraph an appeal[1] may be taken to this Court "at the election" of the party relying on the state statute the validity of which has been denied by the decision of the circuit court of appeals on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and "in that event" a review on certiorari is not to be allowed at the instance of such party. This provision is in obvious contrast with that of section 237 (c) of the Judicial Code as amended by the Act of February 13, 1925, (U. S. C., sec. 344 (c)) relating to appeals from judgments of state courts and providing in such cases that papers on an appeal improvidently sought may be treated as a petition for certiorari. But the event to which the limitation of section 240 (b) applies, in the case of appeals from the circuit court of appeals, is that an appeal will lie as provided and has been taken. If the case is one in which the circuit court of appeals has not denied validity to a statute of a State upon the ground specified, no appeal will lie and the bringing of the appeal in such a case has no effect save to invite its dismissal. As this Court has no jurisdiction to entertain the appeal, it leaves the parties as they were. There is no ground for concluding that it was the intent of the Congress to penalize a party by depriving him of a right granted because he had made a mistake in asserting a right not granted. Accordingly, we conclude that in a case in a circuit court of appeals where no appeal lies, although one has been improvidently taken, application may be made for a writ of certiorari under section 240 (a). The application must be made within the time limited. Act of February 13, 1925, sec. 8; U. S. C., Tit. 28, sec. 350. It was so made in this case.

The petition for writ of certiorari is granted.

Appeal dismissed.
Writ granted.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[1]Writ of error was abolished by the Act of January 31, 1928, c. 14, 45 Stat. 54, as amended by Act of April 26, 1928, c. 440, 45 Stat. 466; U. S. C., Tit. 28, secs. 861 a, 861 b.

SUPREME COURT OF THE UNITED STATES.

No. 423.—October Term, 1931.

Bradford Electric Light Co., Inc., Petitioner, *vs.* Jennie M. Clapper, Administratrix.	On Certiorari to the United States Circuit Court of Appeals for the First Circuit.

[May 16, 1932.]

Mr. Justice Brandeis delivered the opinion of the Court.

This action for damages was brought in a court of New Hampshire under the employers' liability provisions of the Employers' Liability and Workmen's Compensation Act of that State, N. H. Public Laws, 1926, c. 302, to recover for the death of Leon J. Clapper, which the plaintiff claimed was due to his employer's negligence. The case was removed to the federal court on the ground of diversity of citizenship; the defendant, Bradford Electric Light Co., Inc., being a citizen and resident of Vermont and the plaintiff, Jennie M. Clapper, administratrix, being a citizen and resident of New Hampshire. It appeared that the Company had its principal place of business in Vermont and lines extending into New Hampshire; that Leon Clapper, a resident of Vermont, was employed by it there as a lineman for emergency service in either [redacted] and that in the course of his duties, he was sent to restore so[redacted] burned-out fuses at a substation in New Hampshire and while doing so was killed. The Company, invoking the full faith and credit clause of the Federal Constitution, set up as a special defense that the action was barred by provisions of the Vermont Compensation Act; that the contract of employment had been entered into in Vermont, where both parties to it then, and at all times thereafter resided; and that the Vermont Act had been accepted by both employer and employee as a term of the contract.

The District Court ruled that the action was properly brought under the laws of the State of New Hampshire; that the action was based on a tort occurring in that State; and that the Ver-

mont Workmen's Compensation Act had no extra-territorial effect. Accordingly, that court rejected the special defense and denied a motion to dismiss. The case was tried three times before a jury, the third trial resulting in a verdict for the plaintiff in the sum of $4,000. The judgment entered thereon was first reversed by the Circuit Court of Appeals. But upon a rehearing, the judgment of the trial court was affirmed, one judge dissenting. 51 F. (2d) 992, 999. The Company filed in this Court both an appeal and a petition for writ of certiorari. The appeal was denied, and certiorari granted. 284 U. S. 221.

The Vermont Workmen's Compensation Act provides that a workman hired within the State shall be entitled to compensation even though the injury was received outside the State, Vermont General Laws, c. 241, Sec. 5770; that "employers who hire workmen within this state to work outside of the state, may agree with such workmen that the remedies under the provisions of this chapter shall be exclusive as regards injuries received outside this state by accident arising out of and in the course of such employment, and all contracts of hiring in this state shall be presumed to include such an agreement," Sec. 5774; that every contract of employment made within the State shall be presumed to have been made subject to its provisions, unless prior to the accident an express statement to the contrary shall have been made, in writing, by one of the parties, Sec. 5765; and that acceptance of the Act is "a surrender by the parties . . . of their rights to any other method, form or amount of compensation or determination thereof", Sec. 5763. Neither the Company nor Leon Clapper filed a statement declining to accept any provision of the Vermont Act.

The New Hampshire Employers' Liability and Workmen's Compensation Act provides that the employer shall become subject to the workmen's compensation provisions of the Act only by filing a declaration to that effect, N. H. Public Laws, c. 178, § 4; and that even if the declaration is filed, the employee may, subsequent to the injury, still elect either to claim compensation, Sec. 11, or to sue for damages at common law as modified by the employers' liability provisions of the Act. Failure to file such a declaration exposes the employer to a common law action of negligence in which the defenses of assumption of risk and injury by a fellow servant may not be interposed. Secs. 2, 3. The Company filed

in New Hampshire the declaration provided for by its statute.

Thus, each State has a workmen's compensation law of the elective type; but their provisions differ sharply. The New Hampshire statute, unlike that of Vermont, permits the employee or his representative to elect, after the injury, to sue for damages as at common law; and it was as a result of such an election made by the administratrix that the case at bar arose. The main question for decision is whether the existence of a right of action for Leon Clapper's death should be determined by the laws of Vermont, where both parties to the contract of employment resided and where the contract was made, or by the laws of New Hampshire, where the employee was killed.

First. It clearly was the purpose of the Vermont Act to preclude any recovery by proceedings brought in another State for injuries received in the course of a Vermont employment. The provisions of the Act leave no room for construction.[1] The statute declares in terms that when a workman is hired within the State, he shall be entitled to compensation thereunder for injuries received outside, as well as inside, the State, unless one of the parties elects to reject the provisions of the Act. And it declares further that for injuries wherever received the remedy under the statute shall exclude all other rights and remedies of the employee or his personal representative. If the accident had happened in Vermont, the statute plainly would have precluded the bringing of an action for damages in New Hampshire under its employers' liability act.[2] For such action is predicated on a tort; and in Vermont an injury resulting from the employer's negligence is

[1] "*Right to Compensation Exclusive:* The rights and remedies granted by the provisions of this chapter to an employee on account of a personal injury for which he is entitled to compensation under the provisions of this chapter, shall exclude all other rights and remedies of such employee, his personal representatives, dependents or next of kin, at common law or otherwise on account of such injury. Employers who hire workmen within this state to work outside of the state, may agree with such workmen that the remedies under the provisions of this chapter shall be exclusive as regards injuries received outside this state by accident arising out of and in the course of such employment, and all contracts of hiring in this state shall be presumed to include such an agreement." Vt. Gen. Laws, c. 241, § 5774.

[2] Compare Home Insurance Co. *v.* Dick, 281 U. S. 397. No question is here raised of the character of that considered in Atchison, Topeka & Santa Fe Ry. Co. *v.* Sowers, 213 U. S. 55; and Tennessee Coal, Iron & R. Co. *v.* George,

not a tort, if the provisions of the Compensation Act have been accepted. The question is whether the fact that the injury occurred in New Hampshire leaves its courts free to subject the employer to liability as for a tort. That is, may the New Hampshire courts disregard the relative rights of the parties as determined by the laws of Vermont where they resided and made the contract of employment; or must they give effect to the Vermont Act, and to the agreement implied therefrom, that the only right of the employee against the employer, in case of injury, shall be the claim for compensation provided by the statute?

Second. If the conflict presented were between the laws of a foreign country and those of New Hampshire, its courts would be free, so far as the restrictions of federal law are concerned, to attach legal consequences to acts done within the State, without reference to the undertaking of the parties, entered into at their common residence abroad, that such consequences should not be enforced between them. But the conflict here is between the laws of two States; and the Company in setting up as a defense a right arising under the Vermont statute, invokes Art. IV, § 1, of the Federal Constitution, which declares that "full faith and credit shall be given in each State to the public acts . . . of every other State." That a statute is a "public act" within the meaning of that clause is settled. *Modern Woodmen of America* v. *Mixer*, 267 U. S. 544, 550, 551; *Aetna Life Insurance Co.* v. *Dunken*, 266 U. S. 389, 393. See *Tennessee Coal, Iron & R. Co.* v. *George*, 233 U. S. 354, 360; *Chicago & Alton R. Co.* v. *Wiggins Ferry Co.*, 119 U. S. 615, 622.[3] A federal court sitting in New Hampshire is bound equally with courts of the State to observe

233 U. S. 354, of the validity of an attempt to create a statutory cause of action and confine it to the courts of the enacting State.

[3] See also Bothwell v. Buckbee, Mears Co., 275 U. S. 274, 279; Pennsylvania Fire Insurance Co. v. Gold Issue Mining & Milling Co., 243 U. S. 93, 96; Western Life Indemnity Co. v. Rupp, 235 U. S. 261, 274, 275; Texas & New Orleans R. Co. v. Miller, 221 U. S. 408, 416; Louisville & Nashville R. Co. v. Melton, 218 U. S. 36, 50-52; El Paso & Northeastern Ry. Co. v. Gutierrez, 215 U. S. 87, 92, 93; Smithsonian Institute v. St. John, 214 U. S. 19, 28; Allen v. Alleghany Co., 196 U. S. 458, 464, 465; Finney v. Guy, 189 U. S. 335, 340; Johnson v. New York Life Insurance Co., 187 U. S. 491, 496; Eastern Building & Loan Association v. Ebaugh, 185 U. S. 114, 121; Ban-

the command of the full faith and credit clause, where applicable.[4] The precise question for decision is whether that clause is applicable to the situation here presented.

Third. The administratrix contends that the full faith and credit clause is not applicable. The argument is that to recognize the Vermont Act as a defense to the New Hampshire action would be to give to that statute an extra-territorial effect, whereas a State's power to legislate is limited to its own territory. It is true that full faith and credit is enjoined by the Constitution only in respect to those public acts which are within the legislative jurisdiction of the enacting State. See *National Mutual Building & Loan Association* v. *Brahan*, 193 U. S. 635, 647; *Olmsted* v. *Olmsted*, 216 U. S. 386, 395.[5] But, obviously, the power of Vermont to effect legal consequences by legislation is not limited strictly to occurrences within its boundaries. It has power through its own tribunals to grant compensation to local employees, locally employed, for injuries received outside its borders, compare *Quong Ham Wah Co.* v. *Industrial Accident Commission*, 255 U. S. 445, dismissing writ of error, 184 Cal. 26; and likewise has power to exclude from its own courts proceedings for any other form of relief for such injuries.[6] The existence of

holzer v. New York Life Insurance Co., 178 U. S. 402, 405, 406; Lloyd v. Matthews, 155 U. S. 222, 227, 228; Glenn v. Garth, 147 U. S. 360, 367, 369. Compare Royal Arcanum v. Green, 237 U. S. 531, 544, 545; Converse v. Hamilton, 224 U. S. 243, 260, 261; Hancock National Bank v. Farnum, 176 U. S. 640; Crapo v. Kelley, 16 Wall. 610; Green v. Van Buskirk, 5 Wall. 307. See 2 Farrand, "Records of the Federal Convention", pp. 188, 447, 577. Congress, acting under the authority of Article IV, § 1, has provided for the authentication of "acts of the legislature of any state or territory or of any country subject to the jurisdiction of the United States." Act of May 26, 1790, c. 11; Act of March 27, 1804, c. 56, § 2; Rev. Stat. § 905, U. S. Code, Tit. 28, § 687.

[4] Compare Mills v. Duryee, 7 Cranch. 481; Rev. Stat. §§ 905, 906. See also Minnesota v. Northern Securities Co., 194 U. S. 48, 72; Cooper v. Newell, 173 U. S. 555, 567.

[5] See also New York Life Insurance Co. v. Head, 234 U. S. 149, 161; Bonaparte v. Tax Court, 104 U. S. 592, 594. Compare Atchison, Topeka & Santa Fe Ry. v. Sowers, 213 U. S. 55, 70; Tennessee Coal, Iron & R. Co. v. George, 233 U. S. 354, 360.

[6] For decisions construing state workmen's compensation acts as applicable, under appropriate circumstances, to injuries received outside the State, and

this power is not denied. It is contended only that the rights thus created need not be recognized in an action brought in another State; that a provision which Vermont may validly enforce in its own courts need not be given effect when the same facts are presented for adjudication in New Hampshire.

The answer is that such recognition in New Hampshire of the rights created by the Vermont Act, can not, in any proper sense, be termed an extra-territorial application of that Act.[1] Workmen's compensation acts are treated, almost universally, as creating a statutory relation between the parties—not, like employer's liability acts, as substituting a statutory tort for a common law

upholding the validity of the acts as so construed, see Quong Ham Wah Co. v. Industrial Accident Commission, 184 Cal. 26, 36; Industrial Commission v. Aetna Life Insurance Co., 64 Colo. 490, 490; Kennerson v. Thames Towboat Co., 89 Conn. 367, 375; Metropolitan Casualty Insurance Co. v. Huhn, 165 Ga. 667, 670; Beall Bros. Supply Co. v. Industrial Commission, 341 Ill. 198, 199; Pierce v. Bekins Van & Storage Co., 185 Iowa 1346, 1356; Saunder's Case, 126 Me. 144, 146; Pederzoli's Case, 269 Mass. 550, 553; Crane v. Leonard, Crossette & Riley, 214 Mich 218, 231; State *ex rel.* Chambers v. District Court, 139 Minn. 205, 208, 209; State *ex rel.* Loney v. Industrial Accident Board, 87 Mont. 191, 195, 196; McGuire v. Phelan-Shirley Co., 111 Neb. 609, 611, 612; Rounsaville v. Central R. Co., 87 N. J. Law 371, 374; Matter of Post v. Burger & Gohlke, 216 N. Y. 544, 549 (compare Smith v. Heine Safety Boiler Co., 224 N. Y. 9, 11, 12; Matter of Cameron v. Ellis Construction Co., 252 N. Y. 394, 397); Grinnell v. Wilkinson, 39 R. I. 447, 462, 463; Smith v. Van Noy Interstate Co., 150 Tenn. 25, 36; Texas Employers' Ins. Ass'n v. Volek, 44 S. W. (2d) 795, 798 (Tex. Civ. App.); Pickering v. Industrial Commission, 59 Utah 35, 38; Gooding v. Ott, 77 W. Va. 487, 492, 493; Anderson v. Miller Scrap Iron Co., 169 Wis. 106, 114, 115. A contrary construction was reached in Altman v. North Dakota Workmen's Compensation Bureau, 50 N. D. 215; Sheehan Pipe Line Const. Co. v. State Industrial Commission, 151 Okla. 272, 273. Early decisions to like effect, in California, Illinois, and Massachusetts, have been superseded by statute. See North Alaska Salmon Co. v. Pillsbury, 174 Cal. 1; Union Bridge & Construction Co. v. Industrial Commission, 287 Ill. 396, 398; Gould's Case, 215 Mass. 480. The provisions of the state statutes in respect to injuries occurring outside the state are summarized in Schneider, "The Law of Workmen's Compensation" (2d ed. 1932), vol. I, pp. 428-433.

[1] The statute does not undertake to prohibit acts beyond the borders of the State. Compare Allgeyer v. Louisiana, 165 U. S. 578; Nutting v. Massachusetts, 183 U. S. 553, 557. It does not attempt to forbid or regulate subsequent modification of the Vermont contract, or the formation of subsidiary contracts, or new agreements, by the parties in other States. Com-

tort. See *Cudahy Packing Co.* v. *Parramore*, 263 U. S. 418, 423; *Mulhall* v. *Nashua Manufacturing Co.*, 80 N. H. 194, 197; *Matter of Cameron* v. *Ellis Construction Co.*, 252 N. Y. 394, 396; *Chandler* v. *Industrial Commission*, 55 Utah 213, 217; *Anderson* v. *Miller Scrap Iron Co.*, 169 Wis. 106, 113, 117, 118. The relation between Leon Clapper and the Company was created by the law of Vermont; and as long as that relation persisted its incidents were properly subject to regulation there. For both Clapper and the Company were at all times residents of Vermont; the Company's principal place of business was located there; the contract of employment was made there; and the employee's duties required him to go into New Hampshire only for temporary and specific purposes, in response to orders given him at the Vermont office. The mere recognition by the courts of one State that parties by their conduct have subjected themselves to certain obligations arising under the law of another State is not to be deemed an extra-territorial application of the law of the State creating the obligation.[8] Compare *Canada Southern Ry. Co.* v. *Gebhard*, 109 U. S. 527, 536, 537.

By requiring that, under the circumstances here presented, full faith and credit be given to the public act of Vermont, the Federal Constitution prevents the employee or his representative from asserting in New Hampshire rights which would be denied him in the State of his residence and employment. A Vermont court

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pare New York Life Insurance Co. *v.* Head, 234 U. S. 149; New York Life Insurance Co. *v.* Dodge, 246 U. S. 357. It affects only the rights and liabilities of parties who by their conduct within the State have subjected themselves to its operation. As to those parties, its effect is not to create a liability for acts without the State, compare Western Union Telegraph Co. *v.* Brown, 234 U. S. 542, but to give rise to a defense in consequence of acts within.

[8] See Barnhart *v.* American Concrete Steel Co., 227 N. Y. 531, 535, denying recovery in a common law action for damages in the state of injury, on the ground that the employee's remedy was for compensation under the law of the state of employment. Compare In re Spencer Kellogg & Sons, 52 F. (2d) 129, 134, reversed on other grounds, 285 U. S. —. Compensation was similarly denied in Hall *v.* Industrial Commission, 77 Colo. 338, 339; Hopkins *v.* Matchless Metal Polish Co., 99 Conn. 457, 464; Proper *v.* Polley, 233 N. Y. App. Div. 621. Compare Scott *v.* White Eagle Oil & Refining Co., 47 F. (2d) 615, 616. See also Darsch *v.* Thearle Difield Fire Works Display Co., 77 Ind. App. 357. Compare Wiley *v.* Grand Trunk Ry. of Canada, 227 Fed. 127, 130; Mexican Nat. R. Co. *v.* Jackson, 118 Fed. 549, 552.

could have enjoined Leon Clapper from suing the Company in New Hampshire, to recover damages for an injury suffered there, just as it would have denied him the right to recover such damages in Vermont. Compare *Cole* v. *Cunningham*, 133 U. S. 107; *Reynolds* v. *Alden*, 136 U. S. 348, 353. The rights created by the Vermont Act are entitled to like protection when set up in New Hampshire by way of defense to the action brought there. If this were not so, and the employee or his representative were free to disregard the law of Vermont and his contract, the effectiveness of the Vermont Act would be gravely impaired. For the purpose of that Act, as of the workmen's compensation laws of most other States, is to provide, in respect to persons residing and businesses located in the State, not only for employees a remedy which is both expeditious and independent of proof of fault, but also for employers a liability which is limited and determinate. Compare *New York Central R. Co.* v. *White*, 243 U. S. 188; *Hawkins* v. *Bleakly*, 243 U. S. 210; *Mountain Timber Co.* v. *Washington*, 243 U. S. 219.

Fourth. It is urged that the provision of the Vermont statute which forbids resort to common law remedies for injuries incurred in the course of employment is contrary to the public policy of New Hampshire; that the full faith and credit clause does not require New Hampshire to enforce an act of another State which is obnoxious to its public policy; and that a federal court sitting in that State may, therefore, decline to do so. Compare *Union Trust Co.* v. *Grosman*, 245 U. S. 412. It is true that the full faith and credit clause does not require the enforcement of every right conferred by a statute of another State. There is room for some play of conflicting policies. Thus, a plaintiff suing in New Hampshire on a statutory cause of action arising in Vermont might be denied relief because the forum fails to provide a court with jurisdiction of the controversy; see *Chambers* v. *Baltimore & Ohio R. Co.*, 207 U. S. 142, 148, 149; compare *Douglas* v. *New York, New Haven & Hartford R. Co.*, 279 U. S. 377; or because it fails to provide procedure appropriate to its determination, see *Tennessee Coal, Iron & R. Co.* v. *George*, 233 U. S. 354, 359; compare *Slater* v *Mexican National R. Co.*, 194 U. S. 120, 128, 129; or because the enforcement of the right conferred would be obnoxious to the public policy of the forum, compare *Bothwell* v. *Buckbee, Mears Co.*,

275 U. S. 274, 277-279; *Union Trust Co.* v. *Grosman*, 245 U. S. 412; *Bond* v. *Hume*, 243 U. S. 15, 25; *Converse* v. *Hamilton*, 224 U. S. 243, 260, 261; or because the liability imposed is deemed a penal one, see *Galveston, Harrisburg & San Antonio Ry. Co.* v. *Wallace*, 223 U. S. 481, 490, compare *Stewart* v. *Baltimore & Ohio R. R.*, 168 U. S. 445, 448. But the Company is in a position different from that of a plaintiff who seeks to enforce a cause of action conferred by the laws of another State. The right which it claims should be given effect is set up by way of defense to an asserted liability; and to a defense different considerations apply. Compare *Home Insurance Co.* v. *Dick*, 281 U. S. 397, 407, 408. A State may, on occasion, decline to enforce a foreign cause of action. In so doing, it merely denies a remedy, leaving unimpaired the plaintiff's substantive right, so that he is free to enforce it elsewhere. But to refuse to give effect to a substantive defense under the applicable law of another State, as under the circumstances here presented, subjects the defendant to irremediable liability. This may not be done. Compare *Modern Woodmen of America* v. *Mixer*, 267 U. S. 544, 550, 551; *Aetna Life Insurance Co.* v. *Dunken*, 266 U. S. 389; *Royal Arcanum* v. *Green*, 237 U. S. 531. See also *Western Union Telegraph Co.* v. *Brown*, 234 U. S. 542; *Atchison, Topeka & Santa Fe Ry. Co.* v. *Sowers*, 213 U. S. 55, 69.

Moreover, there is no adequate basis for the lower court's conclusion that to deny recovery would be obnoxious to the public policy of New Hampshire. No decision of the state court has been cited indicating that recognition of the Vermont statute would be regarded in New Hampshire as prejudicial to the interests of its citizens.[*] In support of the contention that the provision of the Vermont Act is contrary to the New Hampshire policy, it is urged that New Hampshire's compensation law is unique among workmen's compensation acts in that it permits the injured employee to elect, subsequent to injury, whether to bring a suit based upon

[*] Compare Saloshin v. Houle, 155 Atl. 47, an action of negligence by the widow of a New York resident killed in New Hampshire while working for a New York firm, brought against a third person residing in New Hampshire. The Supreme Court of New Hampshire held that the widow's right of action was barred by her acceptance of compensation under the New York Act, and that the acceptance, in accordance with the provisions of that Act, operated as an assignment to the compensation insurer of her rights against the defendant.

negligence or to avail himself of the remedy provided by the Act; and that the legislature of New Hampshire has steadily refused to withdraw this privilege.[10] But the mere fact that the Vermont legislation does not conform to that of New Hampshire does not establish that it would be obnoxious to the latter's public policy to give effect to the Vermont statute in cases involving only the rights of residents of that State incident to the relation of employer and employee created there. *Northern Pacific R. Co.* v. *Babcock*, 154 U. S. 190, 198. Nor does sufficient reason appear why it should be so regarded. The interest of New Hampshire was only casual. Leon Clapper was not a resident there. He was not continuously employed there. So far as appears, he had no dependent there. It is difficult to see how the State's interest would be subserved, under such circumstances, by burdening its courts with this litigation.

Sixth. The administratrix urges that the Company had in fact accepted the provision of the New Hampshire Compensation Act, which reserves to the employee the right to elect to sue for damages as at common law. It was upon this ground, primarily, that the Circuit Court of Appeals based, upon the rehearing, the affirmance of the judgment of the District Court. The circumstances under which the acceptance of the New Hampshire Act was filed show that the Company did not intend thereby to abandon its rights under the Vermont law in respect to Leon Clapper or other employees similarly situated. It had had occasion to hire in New Hampshire residents of that State for employment there in connection with the operation of its lines in that State. In case of injury of such employees, failure to accept the New Hampshire Act would have made the petitioner liable to an action for negligence in which it would have been denied the defenses of assumption of risk and injury by a fellow servant. *Jutras* v. *Amoskeag Manufacturing Co.*, 84 N. H. 171, 173; *Levesque* v. *American Box*

[10]Attention is called to the following rejected compensation bills abolishing the right of election after accident: 1915 Session, House Bills No. 206, 302, Journal, pp. 720, 1021; 1917 Session, House Bills No. 319, 485, Journal, pp. 567, 568; 1919 Session, House Bill No. 134, Journal, p. 437; 1927 Session, House Bill No. 212, Journal, p. 752; 1929 Session, House Bill No. 292, Journal, p. 752. In 1923 the statute was amended to increase the compensation, N. H. Laws, 1923, c. 91; and in 1925, as amended, it was reënacted without change, N. H. Public Laws, c. 178.

& Lumber Co., 84 N. H. 543. Its acceptance is to be construed as referable only to such New Hampshire employees, and not as bringing under the New Hampshire Act employees not otherwise subject to it.

We are of opinion that the rights as between the Company and Leon Clapper or his representative are to be determined according to the Vermont Act. The judgment of the Circuit Court of Appeals must accordingly be reversed. We have no occasion to consider whether if the injured employee had been a resident of New Hampshire, or had been continuously employed there, or had left dependents there, recovery might validly have been permitted under New Hampshire law.

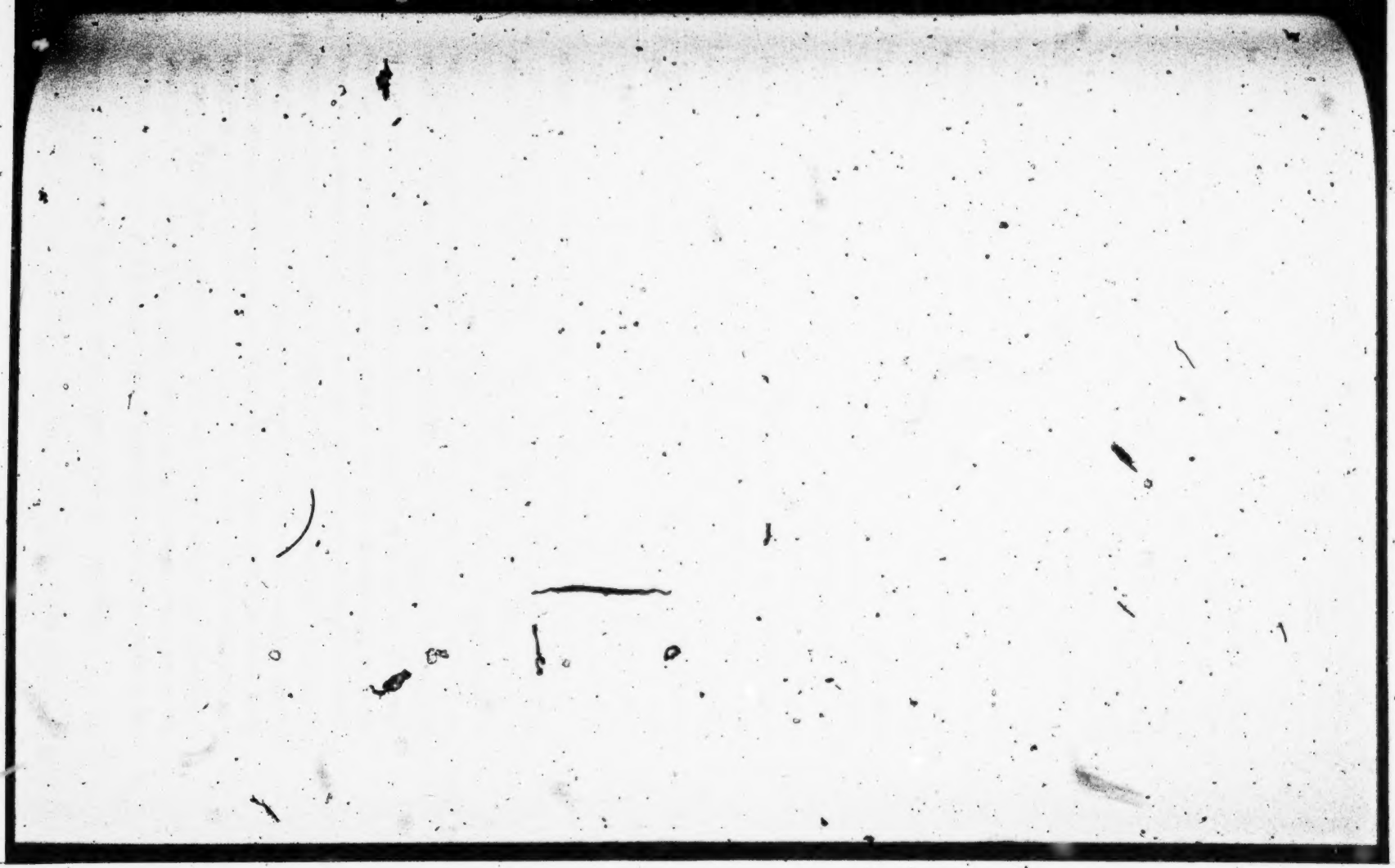
Reversed.

Mr. Justice CARDOZO took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.



SUPREME COURT OF THE UNITED STATES.

No. 423.—October Term, 1931.

Bradford Electric Light Co., Inc., Petitioner, vs. Jennie M. Clapper, Administratrix.	On Certiorari to the United States Circuit Court of Appeals for the First Circuit.

[May 16, 1932.]

Mr. Justice Stone, concurring.

I agree that in the circumstances of the present case, the courts of New Hampshire, in giving effect to the public policy of that state, would be at liberty to apply the Vermont statute and thus, by comity, make it the applicable law of New Hampshire. In the absence of any controlling decision of the New Hampshire courts, I assume, as does the opinion of the Court, that they would do so and that what they would do we should do. Hence, it seems unnecessary to decide whether that result could be compelled, against the will of New Hampshire, by the superior force of the full faith and credit clause.

If decision of that question could not be avoided, I should hesitate to say that the Constitution projects the authority of the Vermont statute across state lines into New Hampshire, so that the New Hampshire courts, in fixing the liability of the employer for a tortious act committed within the state, are compelled to apply Vermont law instead of their own. The full faith and credit clause has not hitherto been thought to do more than compel recognition, outside the state, of the operation and effect of its laws upon persons and events within it. *Bonaparte* v. *Tax Court*, 104 U. S. 592; *Atchison, Topeka & Santa Fe Railroad Co.* v. *Sowers*, 213 U. S. 55; *Olmsted* v. *Olmsted*, 216 U. S. 386; *Tennessee Coal, Iron & R. R. Co.* v. *George*, 233 U. S. 354; *Hood* v. *McGehee*, 237 U. S. 611; see *Union Trust Co.* v. *Grosman*, 245 U. S. 412, 415, 416; *Western Union Telegraph Co.* v. *Brown*, 234 U. S. 542, 547.

It is true that in this case the status of employer and em terminable at will, was created by Vermont laws operating them while they were within that state. I assume that th of its creation there must be recognized elsewhere, whenev terial. But I am not prepared to say that that status, volun continued by employer and employe and given a *locus* in Hampshire by their presence within the state, may not be lated there according to New Hampshire law, or that the consequences of acts of the employer or employe there, which out of or affect the status in New Hampshire, must, by ma of the Constitution, be either defined or controlled, in the Hampshire courts, by the laws of Vermont rather than of Hampshire.

The interest, which New Hampshire has, in exercising that trol, derived from the presence of employer and employe w its borders, and the commission of the tortious act there, least as valid as that of Vermont, derived from the fact th status is that of its citizens, and originated when they were in mont, before going to New Hampshire. I can find nothing history of the full faith and credit clause, or the decisions it, which lends support to the view that it compels any st subordinate its domestic policy, with respect to persons and acts within its borders, to the laws of any other. On the con I think it should be interpreted as leaving the courts of New H shire free, in the circumstances now presented, either to app refuse to apply the law of Vermont, in accordance with their interpretation of New Hampshire policy and law.